Supreme Court of the United States.

L. MADISON DAY

versus

THOMPSON MICOU AND OTHERS.

No. 180.

Error to the Supreme Court of the State of Louisiana.

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Supreme Court of United States.

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Statement of the Case.

The defendants in this court were plaintiffs in the District Court of the Parish of Jefferson in this State.

They commenced a hypothecary action in that court, as the children and heirs of Mrs. Anna D. Thompson Micou, widow of William C. Micou, against Judah P. Benjamin, and Joseph Benjamin, as mortgagors of a parcel of land described in the mortgage, and against L. Madison Day, the plaintiff in this court, as a third possessor, to enforce the mortgage by the sale of the property hypothecated.

Code Pr. Art. 61, 62. 68, 69.

The plaintiffs established their claim by producing a mortgage in which J. P. Benjamin acknowledged a debt to Mrs. Micou for the sum of $10,000, borrowed money,

to be paid four years after date, with interest at the rate of eight per cent. per annum, payable quarterly, and a mortgage by J. P. and Joseph Benjamin to her of a block of lots, No. 63, in the village of Hurstville, in the parish of Jefferson, with a pact de non aliendo that the mortgagors would not sell, alienate or encumber the property to the prejudice of this mortgage.

This mortgage was dated the 23d of July, 1858, and recorded the same day, and re-inscribed in 1865. Record, pp. 17, 18, 19. The document, C, (Rec. p. 20) shows that the block of lots No. 63 was owned by the mortgagors, J. P. and Joseph Benjamin, in equal portions, and the same fact is stated in the mortgage itself. The plaintiffs proved due demand on the mortgagors, and that the defendant was in the possession of the property at the time the suit was brought.

Mrs. Micou died in the State of Alabama, in May, 1864, prior to any of the proceedings in the District Court of the United States hereafter mentioned, and the plaintiffs are her children and heirs. Rec. 14, Clark's tes.

J. P. Benjamin and Joseph Benjamin were adjudged to be mortgagors, and the amount of the debt was established against them, from which judgment there has not been an appeal; and they are not plaintiffs in this writ of error.

II.

STATEMENT OP THE DEFENCE OF THE PLAINTIFF IN ERROR

The title of L. M. Day arises out of a record of proceedings in the District Court of the United States at

New Orleans, commencing on page 26 and terminating at page 41 of the Record. On the 26th of January, 1865, an information was filed in that court, in which it was asserted that there had been a seizure as forfeited to the United States, a block of lots in the town of Hurtsville, in the parish of Jefferson, one of which blocks of lots it is affirmed is the same described in the mortgage of the brothers Benjamin to Mrs. Micou. For the present we deal with the case as if the block No. 63 of these proceedings is the block No. 63 of the mortgage. The ground upon which the forfeiture is asserted is that Judah P. Benjamin was engaged in rebellion against the United States within the terms of the act of Congress of the 17th July, 1862, and had held under the Confederate States offices of trust and profit, which are designated in the said act as causes for confiscation and seizure, and had aided and abetted in the rebellion. He is charged to have been the owner of this property at the date of the act. R. 26, 27, 28. An order of publication was made, by which all persons interested in the property, were required to appear on the 13th February, 1865, to answer and to show cause "why said property and real estate, and the right, title and interest therein of the said J. P. Benjamin should not be condemned and sold according to law." R. 28. There was no contestation; and on the 18th day of March, 1865, the judgment of condemnation is entered. The decretal order describes the property as belonging to J. P. Benjamin. R. 32.

The property was sold 15th May, 1865—R. 33—and a deed was executed to the purchaser L. M. Day.

The title thus derived is relied upon to defeat the prior mortgage from Judah P. Benjamin and also Joseph Benjamin to Mrs. Micou. The claim is that the entire block of lots was sold, and that the entire fee simple and dominion was conveyed in the decree and the sale.

Day's Ans., R. fol. 19, 20.

III.

Propositions relied on by the defendants in error to support the judgment of the District Court of Jefferson and of the Supreme Court. Record, pp. 45–50; Record 69–73.

1. It manifestly appears from the record that Mrs. Micou, the mother of defendants, in July, 1858, about four years prior to the act of Congress under which the plaintiff claims, and nearly seven years prior to the judgment of forfeiture in the District Court of the United States against J. P. Benjamin, acquired a valid mortgage upon the property described in the petition from Judah P. Benjamin and Joseph Benjamin, joint owners, to satisfy an acknowledged debt; which mortgage was duly and legally inscribed, and of which there is no proof of any satisfaction by payment or release, and that these defendants, as heirs at law, are entitled to the same.

C. C., Arts. 3245, 3249, 3267.

2. That upon a proper construction of the act of Congress referred to in the record, there was nothing offered for sale, or which could be sold or purchased, except the

right, title, interest and claim remaining in Judah P. Benjamin, at the date of the act of Congress, and of his commission of the offences charged against him in the information, to the property described in the libel.

3. That the description of the property in the libel of information, the monition and seizure was not sufficient to justify the conveyance of the property described in the mortgage, or for the mortgagees to take notice of the proceedings.

IV.

ARGUMENT AND CITATION OF AUTHORITIES.

The evidence in the record has established to the satisfaction of the District Court of Jefferson and the Supreme Court of the State that Mrs. Micou had acquired by the papers a mortgage valid in substance and in form, sufficient to entitle her heirs to maintain a hypothecary action against the mortgagors and the third possessor for the sale of the property to satisfy their debt.

This judgment is conclusive in favor of the title of the defendants, *unless* the plaintiff in error shall be able to show that he has a superior right, derived from the proceedings in the District Court of the United States for the condemnation of Mr. J. P. Benjamin's estate. This brings us to examine the act of 17th July, 1862. The first four sections of that act relate to persons who shall be concerned in rebellion or insurrection, and they do not affect any right in specific property other than in slaves, after a judgment of conviction.

The fifth section declares the general object of the remainder of the act. The object of that portion of the act is stated to be "to insure the speedy termination of the present rebellion," by "the seizure of all the *estate* and *property, money, stocks, credits, effects of the* PERSONS HEREINAFTER NAMED IN THIS SECTION, and to apply and use the same and proceeds thereof for the support of the army of the United States."

The question at once arises, who are these persons who are thus made liable to the punitive clauses of this act? There are six sub-sections to the 5th section we have quoted, and in five of these the persons designated are the officers and agents of the Confederate government, and of the State and municipal governments of the Confederacy.

The sixth sub-section relates to those holding property in the States not in the Confederacy who should aid the rebellion.

Mr. Benjamin is charged under several of these sub-sections, and the terms of these sub-sections could not have embraced but a very few women, if any, in the Confederate States. None of them held the offices enumerated, and it is not likely that the public agents of those communities were selected from that class of the population.

There is no charge against Mrs. Anna D. Thompson Micou that she, in her life, had incurred any responsibility under that act.

The sixth section of the act introduces a class of persons who might or might not have been officers or agents of the Confederacy. They are persons engaged in armed rebel-

lion, or who aided or abetted such rebellion. The property, estate and effects of those persons were made liable to seizure in the same manner as the others, but after a proclamation by the President and refusal to comply with its terms.

The first six sections of the act which define the persons who may become subjects of its provisions, furnish no argument for a proposition that there could be a seizure, or use of any estate, other than that of the individuals enumerated, and that each seizure should be directed against persons identified and distinguished.

The seventh section of the act provides the machinery for the CONDEMNATION and *sale* of any SUCH property, after the same shall have been *seized*. What property is referred to in this clause? As respects this case, it is the property, right, estate, which Mr. J. P. Benjamin had at the time of the passage of the act of 1862.

The import of this act is, that the estates, rights and effects of those persons described in it shall be employed to overcome their own resistance to the authority of the United States. It is inconceivable that the United States should have contemplated more than this. Nor are we able to find any more than this in the act of 1862.

The 7th section provides that to secure the condemnation "proceedings *in rem* shall be instituted in the name of the United States, in any District Court thereof, * * * within which the *property above described* may be found * * * which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases; and if said property shall be found to have belonged to a per-

son engaged in rebellion, * * * the same shall be condemned as enemies' property and become the property of the United States, and may be disposed of as the court shall decree," etc., etc. The words *in rem* are relied upon to thow that the entire property, domain, estate and interest that any one had, or could acquire, was to be the subject matter for the sale just as in some cases of sale of personal property in admiralty and revenue cases.

But this gives an extensive operation and a reach to these words which would be contrary to the use of the words themselves, and to the aim of Congress in employing them. The words "in rem" derive their meaning in judicial proceedings from the subject to which they are applied, and the aim they are to accomplish. This hypothecary action is a proceeding IN REM. The object is to procure the sale of a specific parcel of land and not to obtain a personal judgment. Moore vs. Allain, 10 La. Rep. 492–496. Sales of real estate under decrees of the court of probate, for the payment of succession debts, are proceedings IN REM. 11 Serg. and R. 430, 6 Port (Ala.) R. 220. Suits commenced by attachment in Louisiana, are proceedings in rem; the judgment authorizes sale of specific estate attached—Page vs. Generes, 6 Ann. 549; 8 Allen, R. 20.

In none of these cases is there any guarantee of the title sold, nor can a purchaser claim more than the interest of the person against whom the proceedings are taken, or the interest which was pledged for the satisfaction of the demand prosecuted. Upon grounds of policy, personal property which is the subject of a maritime lien, is sold in certain cases under an admiralty decree, dis-

charged of all other liens or claims; but we do not understand that a purchase under that decree would bar an independent, superior and adverse title, of which the owner had been wrongfully deprived before the liens had arisen. In revenue cases the *res* is treated as the criminal and is forfeited.

But the whole scope of the act of 1862, shows that persons of a specific class, whose acts had been obnoxious to the government of the United States were the objects of pursuit, and that no harm or disturbance was intended for persons who did not belong to that class; there was to be proof of the connection with the acts complained of, by the person who was charged in the information. The proceedings *in rem* were to be taken to ascertain his offense and that the property was his. But the Congress did not undertake to conclude the whole world by such a decree. This court interprets this portion of the act of Congress as relating to the form of the proceedings. The proceedings were to be in general conformity to proceedings in admiralty and revenue cases.

They were not admiralty nor revenue cases; nor to be governed by any law of the admiralty or of the Treasury.

Union Insurance Company, 6 Wal. 767. 770.

The United States have not adopted any recondite, or remote, or astute language to produce the effect of confiscating the property of persons not found guilty, upon a pretext that the property belonged to a person accused in the information. It will be seen in this case that the monition was published about two weeks in a paper pub-

1865, and the date of the decree in March. It is obvious that none of these plaintiffs were embraced in the libel or information, as offenders against the law of the United States. Nor does it appear that they were accountable for the acts or doings of Mr. J. P. Benjamin—or had any capacity to appear in court to defend him.

There is no reason why they should be made accountable for his acts, nor suffer a bereavement of their estate for any of his unlawful conduct.

But it is argued that all persons in the world, male and female, young or old, adult or minor, are parties to this proceeding and bound by the decree. That the decree binds the land, the whole land and every estate in the land. It is a decree "in rem." But one immediate and conclusive answer to this is the joint resolution of Congress, 12 Stats. 627, which explicitly declares that "neither punishment or *proceedings* under said act, shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life." This resolution has been interpreted in the case of Bigelow vs. Forrest, 9 Wal. 339. The real estate of Mr. J. P. Benjamin in this land is an undivided half interest, subject to the payment of his debt of $10,000 of borrowed money to the defendants.

The sale of Joseph Benjamin's interest was a mere nullity. Otherwise, if the Marshal had seized the entire island of Orleans, from Manchac to the Gulf, and from the Mississippi River to the Lakes, as the property of J. P. Benjamin, and a decree of contumacy and default, condemnation and sale had been entered as in

this case—Rec. 32—the whole island would have been inrevocably vested in the United States, and would have been transferred by a sale to the purchaser or purchasers. If there be such a doctrine in this case, we may be allowed to express admiration for the moderation which was contented only with Joseph Benjamin's undivided share. and Mrs. Micou's mortgage security. But we deny there is such a doctrine. The act is severe, rigorous and unusual. It manifests a determined purpose to dispose of the entire property of all persons in office, or in arms in the Confederate States for their own undoing. But it does not go any further.

The act does not provide for the partition of estates held by tenants in common, or co-partners; nor for the settlement of trusts; nor of usufructuary interests; nor of rights under mortgage or family settlements; nor those of lessor and lessee, mortgagor and mortgagee of tenants for life or years. The law authorises the seizure of the estate of a certain class of persons of whom Judah P. Benjamin was without a question one. The President might and did direct the seizure of the entire right, title, claim, estate, of Mr. Benjamin in this block of lots. He did not direct the seizure of the right, title, estate, interest or the claims of the heirs of Mrs. Micou nor of Joseph Benjamin. Mrs. Micou held during her life an interest independently of Mr. Benjamin which was not seized. Mr. Benjamin could not sell, alienate nor mortgage to the President for the United States in July, 1862, nor at any time after, any portion of that land to the prejudice of

this mortgage had he been entirely free from accusation or offence.

Can a man *forfeit* that to which he has no title, or can a judgment of condemnation founded upon criminal proceedings convey a greater estate in land than the person accused was seized or possessed of?

The fundamental rule in Great Britain is declared by the Chancellor to be that "The Crown or its grantee on *forfeiture* takes the estate *forfeited* subject to all charges binding the party, though voluntary, if no fraud, but not sabject to debts at large, and has the same equity to be relieved against a conveyance as the party had for fraud against him." In the case before him a judgment creditor having a lien on the estate, and the grantee of an annuity charged upon it, were preferred to the grantee of the estate of the owner who had been attainted. 2 Vesey, Sr., 116.

This principle has no exception. The Crown cannot avoid an equitable mortgage, as the lien of a factor, or of a wharfinger or bona fide assignment in trust for creditors, or any similar assignment or charge. The reason is "Because they are created when the debtor has legal power to create them, and they all act upon the property before the interest of the crown accrued; and the crown can only take the property subject to such liabilities as the debtor has legally created."

2 Spence Eq. Jur. 774;

1 Phil. R. 733;

Giles vs. Grover, 6 Bli. 292.

A similar rule was administered in the United States

under the various statutes of confiscation and attainder adopted during the revolutionary war, and which were productive of so much harm that constitutional prohibitions and restrictions were introduced to prevent a recurrence of similar enactments. The case of Borland vs. Dean, 4 Mason, 174, was that of the condemnation of the owner of the life estate. It was claimed that the condemnation extended to the remainder-man. Justice Story in his opinion says: "It would be most unjust and absurd to suppose that the legislature meant to confiscate the estate of B. for offence or alienage of A.; to take one man's property for another man's offence or act. Unless the terms of the act were *positive*, *direct* and *absolute*, no such construction ought, out of *decent respect* for the legislature, to be adopted by any court of law."

The cases of Beach vs. Woodhull, Peters' C. C. 2; Higginson vs. Mein, 4 Cr. 415, are cases of mortgage preserved against the term of confiscating acts, which embraced all of the mortgagor's property; and the cases in 5 Binn., 154, and 1 Wash., C. C. R. 299, respectively show that the confiscation extends only to the estate of the delinquent. The Supreme Court of North Carolina protected the estate of a cestuique trust, the trustee having been attainted. The Court say: "I see no reason for believing that the legislature intended that the acts of confiscation should operate upon persons of any description, except those described in the preamble of the act. The avowed object of these acts was to increase the security which the citizens of the state had to their rights, by no means to impair it. C. F. Coissart was one of those per-

sons described in the confiscation laws. His property was confiscated; it was sold and of course the legal title to the land. Be it so. Was the object of the legislature to confiscate any rights but those he possessed. If not, the operation of the act is commensurate to the causes which gave birth to it, and the remedy naturally proportionate and equal to the mischief.

Cam. & Nor., N. C. R. 217, 249.

The observations of Freeman, in his history of the Norman Conquest (v. 4, p. 37,) are pertinent to this discussion. He says: "The process of confiscation is well worth studying. Almost every detail illustrates the way, in William's policy, wrong contrived to assume the mask of right; and how the *plunder* of the conquest was gathered in with all the forms of a legal process. The process was strangely like that which went on at the dissolution of the monasteries.* In either case the *new owner stepped into the exact position of the old. He had a right to all which the former had a right, and to nothing more.* He had a claim to all of his advantages, and he was bound by all his burdens."

We are not at all required to impugn the validity of the act of 1862. We assume that the provisions of the act as they apply to the conduct and doings of Mr. Benjamin are not inoperative, for we are not representing him or any interest of his. The point in our case is, that to all of the extent of the claim of Mrs. Micou and her heirs, that she is not to be affected by the acts of Mr. Ben-

*Note.—The act of Parliament 27. H. 8th, ch. 28, provided that all of the debts of these establishments should be paid.

jamin in 1862. If the act of 1862 had punished him by a cancellation of the mortgages he gave bona fide in 1858, it would have been inoperative. There is no act of Congress prior to that of 1862, which makes confiscation of property a penalty or a consequence of a criminal act. The 24th section of the crimes act of 1790, declared that "no conviction or judgment for any of the offences mentioned in that act shall work corruption of blood or forfeiture of estate." The Congress of that day entitled themselves to the same laudation which Pliny bestows upon the Emperor Trajan for a law of the same kind: "Quæ præcipua tua gloria est, sæpius vincitur fiscus cujus causa nusquam pejor est nisi sub bono principe." The same principle is found in the 17 Novelle of Justinian. It is found in the French constitutional charter of 1814, and the constitution of 1830.* A departure from this principle is found here in a temporary act, and the lesson its experience inculcates will probably prevent its repetition. The eminent historian and publicist whose work we have quoted already, (v. iv, p. 50,) says properly and truly, that "Nothing is more repulsive to modern ideas than the confiscation of property under any circumstances. Except in a few extreme cases, except under a few special tyrannies, the tenure of a private estate lives both through domestic revolution and foreign conquest. No conqueror of our days would dream of confiscating the lands of every man who served in the army he had overcome. And in the internal affairs of civilized states, there is a deep and

*Note.—Art. 17. "La peine de la confiscation des biens est abolie et ne pourra pas être rétablie."

growing feeling against confiscation in any shape; against punishing the children for the sins of the father; *even against making the rights of the individual give way to the needs of the commonwealth.*" We do not know that we can bring to the notice of the Court our convictions in relation to this defence more definitely than by the selection of an example. On the 5th day of April, 1794, (the day of the execution of Danton) a lawyer aged twenty-seven years, who had already attained a high reputation, was arrested in one of the departments of France. He had been accused of some incivism; he failed to appear to the accusation and he was condemned for contumacy and outlawed (condamnation par contumace). We submit the material portions of the sentence of the Criminal Court at Nimes: "Every one accused of any conspiracy against the Republic, who will not obey the summons according to the law of the 23d Ventose last, shall be put hors de la loi. The Court declares, that the accused is hors de la loi, and consequently orders that the said accused shall be delivered within twenty-four hours to the executioner to be put to death." "Further, according to the 2nd article of the law of 4th September last," which says "All the property of individuals who at Marseilles, or in the neighboring departments, rise against the National authority, is to be confiscated, and specially applied to the indemnification due to the persecuted patriots in the same localities; the tribunal orders also that the property of the accused shall be confiscated for the benefit of the Republic, and specially applied to the indemnification due to the persecuted patriots in those districts." "And in consequence of

the said confiscation the tribunal orders, according to the law of 19th Brumaire last, that the children of the said accused shall be received into the Foundling Hospital and brought up according to the law of 1st July last."

There were two sons, the eldest not seven years of age. One of them who was to be thrown into the Foundling Hospital for education was one of those who assisted in the counsels which dictated the charter of 1814. In 1830 he was among the statesmen who formed the constitution of that year, and shortly after became the most conspicuous statesman on the continent of Europe. He still lives, at the age of eighty-six, the sage, the philosopher, the consummate master of political science and of conservative statesmanship, with an immaculate whiteness of integrity and a moral courage that never quailed before any trial. The clauses in the constitution of France we have quoted, in no small measure are due to the enlightened counsels of M. Guizot. If we understand the scope of the claim of the plaintiff in error in this case the condemnation is to be entire and all-devouring. A refuge in a Foundling Hospital cannot be reserved for the children of William C. Micou from the proceeds of his life policy in favor of their mother. The French tribunal were satisfied however with the confiscation of the estate of the accused. The legislation of the United States was preserved from the stain of visiting upon the children the offences, or supposed offences of the parent, by the President's joint resolution. The proposition before the Court is one more violative of sound morals and sound

principles of legislation than the one against which the joint resolution was made.

The joint resolution adopted contemporaneously with the act of 1862 reserved the claims and interests of children from confiscation. We find legislation of a similar kind by the Antonines in the Roman Empire and also in a number of the States of Europe before the beginning of this century. But an act of Congress to extinguish the legal and operative mortgages and encumbrances previously existing in the property of a person accused as Mr. Benjamin was, and to extinguish the title of his cotenants, would be regarded as something more unreasonable and unjust than the confiscation of his entire fee simple interest. Such an act of Congress would be subject to the stern and solemn rebuke that this court and its Judges gave to all such legislation in the early cases of Calder vs. Bull, Vandorne vs. Dorrence, and Wilkinson vs. Leland. Such legislation must be "against all reason and justice."

But the claim is that what could not be done directly has been made quite easy by the course of procedure adopted for the enforcement of this act. The whole world it is said became parties to these proceedings by the publication in the True Delta and on the door of the court house of the fact of seizure and the existence of the proceedings against J. P. Benjamin; that the decretal order vesting the property in the United States operated to destroy all other titles and estates in the property. Such is the quality of the pretensions in the answer. R. folio 19, 20, p. 8.

It is apparent as matter of fact that the notice by publication was merely nominal; in but a few if any cases would such a notice reach a non-resident of the territory immediately around the court. War prevented intercourse with the neighboring States, and with the Northern and Eastern the principal intercourse was by sea-going vessels. To conclude all parties having interest in a parcel of land under seizure by a decree against one party charged as having some interest subject to confiscation, would plainly indicate a design to abuse the process and modes of procedure in the tribunals of justice to purposes of mere spoliation. A decent respect for Congress forbids an interpretation fraught with such a result. Nothing but a plain, direct, positive and absolute declaration of such a purpose justifies us in supposing such an intention to have existed.

Borland vs. Dean, 4 Mason, 174:

1 Mass. Rep. 347.

It appears from the opinion of the Supreme Court of this State that the point was made that the judgment in Bigelow vs. Forrest, 9 Wal. 339, has been overruled. We have found no evidence of this statement in the opinions of this Court. In that opinion the Court say the seizure is to be made "of the property belonging to the person." The court say that the heirs may recover the remainder after the expiration of the life estate, notwithstanding he had himself participated in the "armed rebellion" which the act of Congress denounces. The court denied the application of the argument for the reason that the property or right of the son had never been seized. The

cases of Miller & McVeigh, reported in 11 Wal. 257-268, differ from this in the fact that both Miller and McVeigh were accused of a violation of the act of 1862. The questions arise upon records to which they were the parties named and their estates seized and condemned. Here the heirs of Mrs. Micou were not named, nor any right, claim or estate of theirs seized. Mr. Benjamin's estate was seized and he was accused. The defendants had no interest in his estate; they had a separate, distinct and independent estate which Benjamin could not impair in the slightest particular by any sale, alienation, encumbrance, nor by any act producing a forfeiture. But the Court in the case of McVeigh describe the effect of the monition to be what we suppose it to have been. The Court say: "It was averred in the libel that McVeigh was the *owner of the property described*, and that *he was guilty* of the offences charged which rendered it liable to *forfeiture*. The questions of *his guilt and ownership* were therefore fundamental in the case. The notice by publication was given to bring *him* into court. It was in the nature of the substituted service of process." We affirm that there was no other necessary party to the proceeding, except the person standing in the relation of McVeigh or of Benjamin, and similarly in any of their cases.

Upon pages 37 and 38 there appears a document marked F. It is a motion of the District Attorney allowed by the court in the form of an order or rule, to require the Marshal to erase from the State Records of mortgages any mortgage which might be found upon lands condemned as *forfeited* under this act of Congress. The rule or order

was made the 18th day of March, 1865, being the *same day* upon which the judgment was rendered in this proceeding. It appears in the record that under this order the mortgage to Mrs. Micou was erased. R. fo. 85, p. 40. This proceeding was coram non judice. In Louisiana, the inscription of a mortgage is property, and a mortgage properly recorded, cannot be erased without the consent of the mortgagee, or a decree of the court. C. C. 3335–6; 8 Rob. 130.

No court can make a decree to erase a mortgage, except the mortgagee or his assigns be a party to the proceeding. 2 Lous. Ann. 114; 6 Rob. 299; 5 La. Rep. 329; 2 La. R. 489.

IV.

The mortgage to Mrs. Micou was filed with the petition and forms a part of it. It is to be found in the record at folio 38, p. 17.

"The property mortgaged is described as a certain square of ground * * * situated in HURSTVILLE, parish of Jefferson, in this State, bounded by Nayades, Arabella, Cornelius and Nashville streets, and designated by the number sixty-three, on the original plan of said Hurstville, drawn by Benjamin Buisson, surveyor, on the 17th of March, 1837, and deposited in the office of Edward Barnett, a notary in this city, according to which plan the said square measures 243 feet, 4 inches on Nayades street, 426 4-12 feet on Arabella street, 244 feet on Cornelius street, and 377 8-12 feet on Nashville street, which square was acquired by the mortgagors by pur-

chase from George May, in the proportion of one undivided half each, etc."

The property described in the libel is placed in the town of *Hurtsville*.

The Marshal describes the property taken possession of by him to be in the town of HUNTSVILLE, on a plan of Buisson, deposited in the office of E. Barnett, notary public, and it is thus advertised in the monition—R. 30, fo. 65.

The deed to the purchaser is to the description in the libel. The proper description is in the mortgage.

There is a village named *Hurstville*. There is no village by the name of Hurtsville or Huntsville. A person reading a publication that there had been seized a block of lots in Huntsville, which were described on a map in the office of a notary, BARNETT, would not be informed that the block of lots in HURSTVILLE, described on a map in the office of notary BARNETT, was taken.

The parish of Jefferson is the place in which the property is located in each deed.

The witness tells us that the sub-divisions of property in this parish are very numerous, each bearing a distinct name. That these are platted and the plats are to be found in the offices of different notaries. It requires considerable local knowledge to be acquainted with these sub-divisions or their names; many of the citizens are unacquainted with them,—Rec. folio 36, p. 16.

When this property was sold it was in the hands of an agent for taking captured and abandoned property. The agent had no powers of sale. The plaintiff in this court

was his tenant, and paid rent to him till the sale in May, 1865.

The validity of a judgment depends upon the fact that there has been service of process, either directly or constructively. There were four publications in the True Delta, and a publication on the door of the court; a very scant allowance, under the circumstances, if the whole world are to be concluded, and all titles, rights, interests, liens, hypothecations, mortgages, are to be bound.

The publication should be precise, full and exact, under such circumstances.

In the case of Grantham vs. Coners, 1 P. Wms. Rep. 612, an attainder against Major General Thomas Forbes, laird of Auchentoule, was relied on to pass an estate—Major General Alexander Forbes, laird of Auchentoule, was the person intended: Held, that the act did not affect his estate.

In Pennsylvania, Joshua Buffington, of West Bradford, was attainted, but Joshua Buffington, of East Bradford, was intended, and it was morally certain was the person to be affected: Held to be insufficient.

1 Dallas, 63.

1 Wash. C. C. R. 299.

In New York, an estate of Freeman H. could not be sold under a process against Truman H.

32 Barb. 237.

20 Pick. 139.

35 N. H. 163.

12 Mass. 291.

Neither in the libel—the monition—the judgment—is there exactness. We therefore contend that the plaintiff in this court has not shown a title under the government of the United States, or any authority exercised by any officer of the government to impair or to defeat the mortgage granted to the ancestress of the defendants in error, and upon which they have had the favorable judgment of the District Judge of the parish of Jefferson, and of the Supreme Court of this state.

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Supreme Court of the United States.

No. 180.—OCTOBER TERM, 1873.

L. MADISON DAY, Plaintiff in Error,

vs.

T. MICOU et als., Defendants in Error.

Argument by Plaintiff in Error, on Application for Rehearing.

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Of Counsel for Plaintiff in Error.

M'GILL & WITHEROW, PRINTERS, WASHINGTON, D. C.

Supreme Court of the United States.

No. 180. OCTOBER TERM, 1873.

L. MADISON DAY, PLAINTIFF IN ERROR,

vs.

T. MICOU, ET AL., DEFENDANTS IN ERROR.

ARGUMENT BY PLAINTIFF IN ERROR ON APPLICATION FOR REHEARING.

The title of the plaintiff in error to the premises in question was derived under confiscation proceedings in the district court of the United States for the district of Louisiana, under and in pursuance of the act of the 17th of July, 1862, entitled "An act to suppress insurrection and punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes." The proceedings were regular, and the title of the plaintiff in error involves the validity of this confiscation act.

It is well known, after the act was passed and submitted to the President, he entertained the opinion that it provided for the punishment of the crime of treason. Indeed the act was so entitled. This led to a joint resolution, passed by Congress July 17, 1862, declaring that no punishment or proceeding under said act should be so construed as to work a forfeiture of the real estate of the offender beyond his natural life.

It is manifest that the question involved is the character and validity of this act; and the decision which the court

has rendered in this cause will have the effect to destroy all titles acquired by confiscation under the act. Therefore the importance of the decision will justify a rehearing of the merits in this case. The first four sections are clearly an exercise of the power of Government to punish crimes committed against itself. The first section declares that any person who shall be adjudged guilty of treason shall suffer death, &c., or, at the discretion of the court, he shall be imprisoned for not less than five years, and fined not less than ten thousand dollars; and said fine shall be levied and collected on any and all of the personal property of which said person shall be the owner at the time he committed said crime, any sale or conveyance to the contrary notwithstanding.

The great importance of this question, and the importance of the decision in this case, which must, in view of other decisions made by this court in settlement of titles acquired by this act, justify us in asking the court to reconsider their opinion, and allow an oral argument upon this important question; and upon this application for a rehearing, we submit the following points:

First. The act in question, in so far as it relates to the proceedings under which the plaintiff in error acquired title, is not a proceeding to punish crimes, but is a proceeding to condemn enemies' property, and therefore the property condemned was transferred to the purchaser free and clear of all claims not interposed in the course of the proceedings to condemn it.

Second. That the proceedings under which the plaintiff in error acquired title were proceedings *in rem;* that is, against the property. It is not against the owner of the property in particular that the notice was required to be given, but to all the world; and if the defendants in error had any right or lien upon the premises, it was their duty to set up their right or lien in the course of those proceedings, and not having done so, they are barred and precluded as much as though they had been named as parties in record.

It is manifest that if the act in question, in all its parts

and provisions, were such as the President considered it, the proceedings for confiscation of property under sections 5, 6, and 7 would be wholly unconstitutional, as they do not provide for a previous trial and conviction of the owner. These sections are a mere exercise of the war power of the Government, condemning and selling enemies' property, and applying the avails to the prosecution of the war. Therefore, to hold, as the court has in this case, that the property condemned under the proceedings through which the plaintiff in error claims title, could only transfer the life estate of Benjamin, is construing these sections so as to bring them within the constitutional inhibition. The validity of the act depends upon this question, and if these sections are to be construed as in the opinion, then the act is unconstitutional, even as to the life estate of Benjamin. The plaintiff in error was therefore a purchaser of the property itself, and took the same free and clear of all incumbrances.

Third. It is said in the opinion that only the estate of Benjamin could be seized, but it is respectfully submitted that, inasmuch as the libel declared that Benjamin was the owner of the property, and nothing was made to appear in the court below to the contrary, but the court adjudged the property belonged to Benjamin, and condemned and ordered it to be sold as such. The defendants in error might have intervened and set up their claim in that proceeding, but did not, and were barred and foreclosed by the decree of sale in that case.

I.

The *first* point in the opinion which we ask the court to reconsider is that which holds that the property was confiscated *for crime, or as the property of an offender*, so as to be within the words of the joint resolution limiting the forfeiture of the real estate of the offender to the period of his natural life; from which it must result that the act is void, even as to reaching the life estate of Benjamin, be-

cause thus construed the act violates the fifth and sixth amendments to the Constitution.

Now, it is true that, in *Bigelow* v. *Forest*, 9 Wall., 339, which is relied on as the authority for the opinion of the court in this case, it was held that the property which was in controversy in that case had been confiscated as the property of an offender, and was, therefore, within the words of the joint resolution limiting the forfeiture of the real estate of the offender to the term of his life.

But it is equally true that, in *Miller* v. *The United States*, 11 Wall., 268, reaffirmed in *Tyler* v. *Defrees*, *ib.*, 331, and *Brown* v. *Kennedy*, 15 Wall., 699, which decisions are not controverted or mentioned in the opinion, in this case it was expressly declared, in maintaining the constitutionality of the act, *that the property was not confiscated for crime, was not confiscated as the property of offenders, but was confiscated as "enemies' property."*

And not only has it thus been decided by this court that the property was not confiscated as the property of the offender, but the positive and express provision of the statute (12 *U. S. Stat.*, 591, § 7) is, that it "*shall be condemned as enemies' property.*" Therefore, no other condemnation of the property could be made under the act than upon the ground that it was the property of a public enemy, and it was upon that ground that the property was condemned.

We therefore submit that it cannot be said that the property either was or could have been condemned as the property of *an offender*, without a clear departure from the explicit requirements of the act, that it should be condemned *as "enemies' property,"* and without, also, overturning and abolishing the very distinction upon which the constitutionality of the act was placed, and the only ground upon which its constitutionality can be maintained, viz: That it was confiscated as enemies' property, and not as the property of an offender, as punishment for his crime.

In *Miller* v. *The United States*, the court, in determining the nature and character of the confiscation part of the act,

expressly placed the constitutionality of the same upon the ground that the provisions respecting confiscation "*were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States;*" but, on the contrary, that they were "an exercise of *the war power* of the Government, the power of confiscation," and that the property was not confiscated for crime—was not confiscated as the property of *offenders*, but as *enemies' property.*

The language of the court, in *Miller* v. *The United States*, 11 Wall., 304–313, is: "It remains to consider the objection urged on behalf of the plaintiff in error that the acts of Congress under which these proceedings to confiscate the stock have been taken are not warranted by the Constitution, and that they are in conflict with some of its provisions. The objection starts with the assumption that the purpose of the acts was to punish offences against the sovereignty of the United States, and that they are merely statutes against crimes. If this were a correct assumption, if the act of 1861, and the fifth, sixth, and seventh sections of the act of July 17, 1862, were municipal regulations only, there would be force in the objection that Congress has disregarded the restrictions of the fifth and sixth amendments to the Constitution. Those restrictions, so far as material to the argument, are, that no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury; that no person shall be deprived of his property without due process of law, and that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed. But if the assumption of the plaintiff in error is not well made; if the statutes were not enacted under the municipal power of Congress to legislate for the punishment of crimes against the sovereignty of the United States; if, on the contrary, they are an exercise of the war powers of the Government, it is clear they are not affected by the restrictions imposed

by the fifth and sixth amendments. This we understand to have been conceded in the argument. The question, therefore, is, whether the action of Congress was a legitimate exercise of the war power. The Constitution confers upon Congress expressly power to declare war, grant letters of marque and reprisal, and make rules respecting captures on land and water. Upon the exercise of these powers no restrictions are imposed. Of course the power to declare war involves the power to prosecute it by all means and in any manner in which war may be legitimately prosecuted. It therefore includes the right to seize and confiscate all property of any enemy, and to dispose of it at the will of the captor. This is and always has been an undoubted belligerent right. If there were any uncertainty respecting the existence of such a right, it would be set at rest by the express grant of power to make rules respecting captures on land and water. * * * *

"It is sufficient that the right to confiscate the property of all public enemies is a conceded right. Now, what is that right, and why is it allowed? It may be remarked that it has no reference whatever to the personal guilt of the owner of confiscated property, and the act of confiscation is not a proceeding against him. The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent—a relation in which it has been brought in consequence of its ownership.

* * * * * * *

"It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. Venus, 8 Cranch, 253. In either case the property may be liable to confiscation under the rules of war. It is certainly enough to warrant the exercise of this belligerent right that the owner be a resident of the enemy's country, no matter what his nationality. The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within reach of his power, whether within his territory or without it, im-

pairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war. Hence any property which the enemy can use, either by actual appropriation or by the exercise of control over its owner, or which the adherents of the enemy have the power of devoting to the enemy's use, is a proper subject of confiscation.

"It is also to be observed that when the acts of 1861 and 1862 were passed, there was a state of war existing between the United States and the rebellious portions of the country. * * * War existing, the United States were invested with belligerent rights, in addition to the sovereign powers previously held. Congress had, then, full power to provide for the seizure and confiscation of any property which the enemy or adherents of the enemy could use for the purpose of maintaining the war against the Government. It is true the war was not between two independent nations. But because a civil war, the Government was not shorn of any of those rights that belong to belligerency. Mr. Wheaton, in his work on International Law (see 296,) asserts the doctrine to be, that 'the general usage of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as it respects neutral nations.' It would be absurd to hold that, while in a foreign war enemies' property may be captured and confiscated as a means of bringing the struggle to a successful completion, in a civil war of equal dimensions, requiring quite as urgently the employment of all means to weaken the belligerent in arms against the government, the right to confiscate the property that may strengthen such belligerent does not exist. There is no such distinction to be made. Every reason for the allowance of a right to confiscate in case of foreign wars exists in full force when the war is domestic or civil. It is, however, unnecessary to pursue this branch of the subject further. In the Amy Warwick, (2 Sprague, 123,) and in the Prize Cases, (2 Black, 673,) it was decided that in the war of the rebellion the United States sustained the double

character of a belligerent and a sovereign, and had the rights of both. Rose *v.* Himely, 4 Cranch, 272; Cherriott *v.* Foussat, 3 Binney, 253; Dobree *v.* Napier, 3 Scott, 225; Santissima Trinidad, 7 Wheaton, 306; United States *v.* Palmer, 3 Wheaton, 635.

"We come, then, directly to the question, whether the act of 1861, and the fifth, sixth, and seventh sections of the act of 1862, were an exercise of this war power, the power of confiscation, or whether they must be regarded as mere municipal regulations for the punishment of crime.

* * * * * * * *

"It is the act of 1862, the constitutionality of which has been principally assailed. The act had several purposes, as indicated in its title. As described, it was "An act to suppress insurrection, to punish treason and rebellion, *to seize and confiscate the property of rebels*, and for other purposes." The first four sections provided for the punishment of treason, inciting or engaging in rebellion or insurrection, or giving aid and comfort thereto. They are aimed at individual offenders, and they were undoubtedly an exercise of the sovereign, not the belligerent rights of the Government. But when we come to the fifth and the following sections, we find another purpose avowed, not punishing treason and rebellion, as described in the title, but that other purpose, described in the title, as "seizing and confiscating the property of rebels." * *

"It is impossible to read the entire act without observing a clear distinction between the first four sections, which look to the punishment of individual crime, and which were, therefore, enacted in virtue of the sovereign power, and the subsequent sections, which have in view a state of public war, and which direct the seizure of the property of those who were in fact enemies for the support of the armies of the country. * * * * * *

"It is ever a presumption that inhabitants of an enemy's territory are enemies, even though they are not participants in the war, though they are subjects of neutral States, or even

subjects or citizens of the government prosecuting the war against the State within which they reside. * *

"We do not understand the acts, or either of them, to be applied to any other than the property of enemies. All the classes of persons described in the fifth and sixth sections of the a t of 1862 were enemies, within the laws and usages of war. * * * * *

"If it be true that all the persons described in the fifth, sixth, and seventh sections were enemies, as we have endeavored to show they were, it cannot matter by what name they were called or how they were described. The express declaration of the seventh section was that their property should be condemned "as enemies' property," and become the property of the United States, to be disposed of as the court should decree, the proceeds being paid into the treasury for the purposes described, to wit, the support of the army. It was, therefore, as enemies' property, and not as that of offenders against municipal law, that the statute directed its confiscation."

From these extracts from the opinion in *Miller* v. *The United States* it is shown that the court has drawn a clear line of demarkation between the forfeiture of property for crime—the forfeiture of the real estate of the offender—and the confiscation of enemies' property under the war powers of the Government. For the court expressly says, that if the confiscation part of the act was enacted under the municipal power of the Government for the punishment of crime—the punishment of offenders—the exercise of the power would be *subject to the limitations and restrictions of the Vth and VIth Amendments of the Constitution.* But, on the other hand, the court says, that if the confiscation part of the act was not enacted under the municipal power of Congress to legislate for the punishment of crime against the sovereignty of the United States, but was an exercise of the war powers of the Government, it is clear that it is not affected by the Vth and VIth Amendments to the Constitution, as there are no limitations and restric-

tions upon the war powers of the Government—the power of confiscation. And the court then proceeded to hold that, as the property was not confiscated for crime—was not confiscated as the property of an offender, but was confiscated as enemies' property, under the war powers of the Government—the power of confiscation—and that because there were no limitations on the exercise of the war powers of the Government, the limitations of the Vth and VIth Amendments to the Constitution did not apply to the confiscation of enemies' property, and that the act was therefore constitutional.

Now, if this distinction between the forfeiture of the real estate of an offender, and the confiscation of enemies' property is to be preserved, so as to sustain the constitutionality of the act, and the validity of the confiscations had under the same, it seems to us that it is absolutely impossible that the resolution providing that no punishments or proceedings under the act shall be so construed as to work a forfeiture of the real estate of the offender beyond his natural life can be extended to the confiscation of enemies' property, without an abandonment and overturning of the sole and only ground upon which the constitutionality of the same was rested. For the moment it is decided that the resolution extends to and includes the confiscation of enemies' property, as provided in the act, that very moment it is established that the property was confiscated as the property of "the offender," and if so, then it would follow that the act was unconstitutional.

For it is conceded in the opinion in *Miller* v. *The United States*, that if the confiscation was for crime (and the property could not be taken as the property of the offender unless taken for crime) the confiscation would have been subject to the limitations and restrictions of the fifth and sixth amendments to the Constitution, and as the same had not been observed in the act, the validity of the same could not be maintained.

Now it may well be that the court, in deciding, in *Miller* v. *The United States*, that the property was not confiscated

as the property of the offender, did not intend to directly overrule or modify the rule, as declared in *Bigelow* v. *Forrest*, that the property was confiscated as the property of an offender, but as the rule and principles declared in *Miller* v. *The United States*, and the positive words and requirement of the statute, that the property should be condemned as enemies' property, are incompatible, and wholly irreconcilable with the rule as laid down in *Bigelow* v. *Forrest*, and adopted in the opinion in this case, that the property was taken as that of an offender, the latter must yield to the extent of the conflict, or the unconstitutionality of the act must be conceded.

For we submit that the court cannot hold, in order to sustain the constitutionality of the act, that the property was not confiscated as the property of the offender, but as enemies' property; and then, when we come to the construction of the resolution, to hold that the property was confiscated as the property of an offender, without producing an irreconcilable conflict between the cases above referred to, as well as the clear words of the statute, which says the property shall be condemned as enemies' property.

The one doctrine or the other, then, it seems to us, must prevail, because both cannot stand together.

If *Bigelow* v. *Forrest* and the opinion in this case are to be maintained, then the sole and only ground upon which the constitutionality of the act is rested in *Miller* v. *The United States*, as well as the positive words of the statute requiring the property to be condemned as *enemy's property*, are overturned; and the court can then be successfully called upon (and as it no doubt will be during the present term) to declare the act unconstitutional, and all confiscations null and void. For as the opinion maintains that the property was confiscated for crime, (so as to be within the terms of the resolution,) that is all that is necessary, according to what is admitted in *Miller* v. *The United States*, to render the act unconstitutional and void. Nor could this logical consequence be averted by suggesting that the court, in holding, in the construction of the resolution, that

the property was confiscated for crime, did not intend to disturb or overturn the ground upon which the constitutionality of the act had been rested.

For the successful reply would be, that it is the doctrine which is established by the opinion, which must determine whether the act is valid or void. And as the opinion does rest on the ground that the property was taken for crime, was taken as the property of an offender; that is all that is necessary to be shown or established, as we have seen above, to subject the confiscation to the limitations and restrictions of the constitutional amendments in relation to taking property for crime, and, as the same have not been observed in the provisions of the confiscation act, the same would be invalid.

But, on the other hand, if the validity of the act is to be maintained, as declared in *Miller* v. *The United States*, then the doctrine of *Bigelow* v. *Forrest* and the opinion in *this case*, that the property was confiscated for crime, was confiscated as the property of an offender, must be so modified as to agree with the express requirements of the act, that the property should be considered as condemned as enemies' property; and if so, then it is clear that enemies' property is neither within the words or reason of the resolution limiting the forfeiture of the real estate of the offender to the term of his natural life.

And as the only way to save the constitutionality of the act and maintain the legality of the confiscations which have been effected under it, is to adhere to the doctrine laid down in *Miller* v. *The United States*, it is most respectfully submitted that a rehearing ought to be granted in this case.

II.

It is submitted that the proceedings under which plaintiff in error derived title were proceedings *in rem*; that all the world were parties; and that it was the object of the proceedings to determine whether Benjamin was the owner of the property; and that the defendants in error not hav-

ing interposed their claim to or upon the property in those proceedings, as they might have done, are as much foreclosed as if they had done so, and the court had decided against their claim.

By the fifth section of the act of 17th July, 1862, (12 U. S. Stats., 590,) it is made the duty of the President to cause the seizure of all the estate, property, &c., of the persons thereinafter named, and to apply and use the same and the proceeds thereof for the support of the army of the United States. And by the seventh section of the said act it is provided: "That to secure the condemnation and sale of such property, after the same shall have been seized, so that it may be made available for the purposes aforesaid, proceedings *in rem* shall be instituted in the name of the United States in any district court, &c., which proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases; and if said property, whether real or personal, shall be found to have belonged to a person engaged in rebellion, or who has given aid and comfort thereto, the same shall be condemned as enemies' property, and become the property of the United States, and may be disposed of as the court shall decree, and the proceeds thereof paid into the treasury of the United States for the purposes aforesaid."

It is therefore seen that the object and purpose of the proceedings *in rem* were to judicially ascertain and establish the *fact*, whether the property which had been seized was the property of a person named in the act, and if found to be so, it was then to be condemned as enemies' property, and become the property of the United States, and be disposed of as the court should direct, &c.

For "where property is seized and libelled as forfeited to the Government, the sole object of the suit" (says Judge Story, in Gelston *v.* Hoyt, 3 Wheat., 318) "is to ascertain whether the seizure be rightful, and the forfeiture incurred or not."

And Chancellor Kent, (1 Kent's Comm., 113, 10th ed.,) in reference to seizures *jure belli*, says: "A judicial inquiry

must pass upon the case, and the present enlightened practice of commercial nations has subjected all such captures to the scrutiny of judicial tribunals, as the only sure way to furnish due proof that the seizure was lawful. The property is not changed in favor of a neutral vendee or recaptor, so as to bar the original owner, until sentence of condemnation has been pronounced by some court of competent jurisdiction belonging to the sovereign of the captor; and the purchaser must be able to show documentary evidence of the fact to support his title."

"The object and purpose of a proceeding purely *in rem* is to ascertain every possible claimant, and it is instituted on an allegation that the title of the former owner, whoever he may be, has become divested; and notice of the proceeding is given to the whole world to appear and make claim to it. From the nature of the case the notice is constructive only as to the greater part of the world; but it is such as the law presumes will be most likely to reach the persons interested, and such as does, in point of fact, generally reach them." Woodruff *v.* Taylor, 20 Vt., 76.

"To such proceedings, all persons having an interest or title in the subject-matter are, as we have already stated, in law deemed parties; and the decree of the court is conclusive upon all interests and titles in controversy before it." Gelston *v.* Hoyt, 3 Wheat., 319, 320.

Now, as it was alleged in the libel that a certain square of ground fully described therein, and the one against which the mortgage is sought to be enforced, had been seized by the marshal, &c., and "that Judah P. Benjamin is and was on," &c., "the owner of the above-described property," the *fact* as to whether or not he was the owner was directly put in issue by the pleadings.

The ownership of the property, therefore, as well as the lawfulness of the seizure, was a matter of *fact* to be determined by the court *after* it had acquired jurisdiction by the seizure of the *res* and the filing of the libel. And as the court found the property described in the libel to be "the property of Judah P. Benjamin," (Rec., 32,) the fact that

he was the owner of the square against which it is sought to enforce the mortgage, is as conclusively and incontrovertibly established as it is possible for any matter of fact to be established by the judgment of a competent court, and is, therefore, *res judicata* as against all the world.

For where a court has jurisdiction of the subject-matter, (as the district court, which condemned and sold the property unquestionably had by the seizure of the *res*, and the filing of the libel, as will be more fully shown hereafter,) it has a right to decide every question which occurs in the cause, and its decision, whether correct or otherwise, is binding in every other court until set aside by the court which rendered it, or is reversed by some superior appellate tribunal. 1 Pet., 340; 10 Pet., 473; 2 How., 343; 24 How., 450, 457; 1 Wall., 627, 634; 13 Pet., 511.

But it is said in the opinion that all that could be condemned and sold was that which had been lawfully seized and brought within the jurisdiction of the court, and that the property and estate of Benjamin was all that could be seized and condemned; and that those who held other interest were not bound to come in and assert their claims, and that their interests remain unaffected by the decree of condemnation and sale.

Undoubtedly it was not the intention of the act that any other property than that which belonged to a person named in the act should be seized, libeled, condemned, and sold. And it was for this very reason that proceedings *in rem* were required to be instituted in the proper court, so as to afford every person who had any claim to assert in or to the property an opportunity to contest the lawfulness of the seizure, and to ascertain and judicially establish the fact that it had been properly seized, and was the property of a person named in the act, and was therefore liable to condemnation as such, and that the record thereof should be conclusive evidence, in favor of a purchaser under the decree, of all the facts found and established by the same. The proceedings *in rem* could not have been required for any other purpose; for it certainly would have been an

idle as well as useless ceremony to require a judicial investigation as to whether or not the property which had been seized and libeled was or was not the property of a person named in the act, unless the judicial determination thereof was to have the same conclusive force and effect as any other judgment of a competent court.

In no other way would it be possible for a purchaser under the decree to have *record* evidence of the facts adjudicated against all the world. And in no other way was it possible to make the property which had been seized, libeled, condemned, and ordered to be sold, "available for the purposes" specified in the act, as no one certainly could have been found who would have been rash enough to purchase at a judicial sale *under* a decree, unless the same was to have the full force and effect of a judgment, and preclude all claims which had not been brought forward from starting up against the property after any length of time.

It is therefore submitted, with great deference, that the court had jurisdiction, by the seizure of the *res* and the filing of the libel, to determine the matter of *fact* as to the ownership of the property, as alleged therein; to determine whether or not the square of ground which had been seized and libeled was the estate and property of a person named in the act, and as the court found the property described in the libel to be the "property of J. P. Benjamin," this must be accepted, in all collateral actions, as conclusive and irrefragible proof of the *fact* that it was his property, or the absolute verity of the finding of a court of a matter of fact which it was authorized and required to find before it rendered a judgment, must be abandoned.

"The decree" (says Mr. Justice Strong, in Pelham *v.* Way, 15 Wall., 201) * * * "is doubtless conclusive of all matters then adjudicated upon, and as it was a proceeding *in rem*, the subject is to be ascertained from the record, from the information, the monition, and the marshal's return." And, in Ennis *v.* Smith, 14 How., 430, it is said that even a foreign judgment *in rem* "is evidence of the facts adjudicated against all the world."

"A judgment *in rem*" (as is well said by the court, in Lord *v.* Chadbourne, 42 Me., 444) "is an adjudication upon the *status* of some particular subject-matter by a tribunal having complete authority for that purpose. Such an adjudication concludes all persons from saying the thing adjudicated upon was not such as is declared by such adjudication." S. P., 2 Smith's Lead. Cases, 827–8, 6th Am. ed., and numerous cases there cited.

Whether the court was right or wrong, then, in finding that the property seized and libeled was the property of Benjamin, cannot be inquired into collaterally, because it is *res judicata*, and the sufficiency of the proof on which the court took its action does not touch or go to the question of jurisdiction. Comstock *v.* Crawford, 3 Wall., 406.

And the judgment of a court of competent jurisdiction cannot be disputed collaterally, even as to the jurisdictional facts which it finds and recites. Cannon *v.* Cooper, 39 Miss., 784; Latrielle *v.* Dorlenque, 35 Mo., 233; Johnston *v.* Kerhoff, 35 Mo., 291; Wyatt's Administrator *v.* Rambo, 29 Ala., 510; Thompson *v.* Ingham, 14 Q. B., 710, 718, (68 Eng. C. L., 716, 717.)

The conclusiveness of the judgment in such cases does not depend upon the truth of the facts found, but on the fact that the court had authority by law to make the inquiry, to find the facts, and render a judgment; and which being the judgment of a competent court, is conclusive until reversed, and cannot be disputed or questioned collaterally. Coltman *v.* Beardsley, 28 Barb., 51, 52, and numerous cases there cited.

Surely, then, the finding of the district court of the matters of *fact* as to the ownership of the property, which it was not only authorized but required by the act to find after it had acquired jurisdiction by the seizure of the *res* and the filing of the libel, must be conclusive in a collateral action.

For the judgment of a court of competent jurisdiction is conclusive not only as to the points actually decided, but as to all matters which were embraced within the

legitimate scope of the pleadings, and which the parties might have had decided. Aurora City *v.* West, 7 Wall., 82; Green *v.* Van Buskirk, *ib.*, 139; Beloit *v.* Morgan, *ib.*, 619; Comparet *v.* Hanna, 34 Ind., 74, 77, 78; Donohu *v.* Prentiss, 22 Wis., 311, 316, 317; Herrett *v.* Yandes, 34 Ind., 102.

A judgment, sentence, or decree of a competent court is conclusive evidence of every fact on which it must have been founded. Bloodgood *v.* Grasey, 31 Alab., 575.

Every judgment is *prima facie* a final and substantial determination of the matter in controversy, and a matter that has once been decided cannot be overcome by extrinsic evidence.

Individual good and public policy both require that there should be some fixed and certain end to litigation, and that the principle of *res judicata* will not yield to the clearest proof that a defense or cause of action was overruled which should have been sustained, or sustained when it should have been rejected, and that injustice will result unless the mistake is corrected. Bower *v.* Tallman, 5 W. & S., 556, 562; Beale *v.* Pearce, 12 Md., 580; Mondell *v.* Steele, 8 M. & W., ——; 2 Smith's L. C., 809, 6 Am. ed.

For it is well settled that the correctness of a judgment cannot be impeached on the ground that the law was mistaken by the court or the facts wrongfully found by the jury, because the proper remedy lies in a bill of exceptions or a motion for a new trial; and any injury which results from the failure to pursue it must be imputed to the negligence of the injured party, and not to the tribunal which decided against him. Kelly *v.* Pike, 5 Cush., 484; Marsh *v.* Pier, 4 Rawle, 285; Lloyd *v.* Barr, 1 Jones, 41; Baker *v.* Rand, 13 Barb., 152; Mervine *v.* Parker, 18 Ala., 241; 2 Smith's L. C., 809, 6 Am. ed.

And as the district court undoubtedly acquired jurisdiction by the seizure of the *res* and the institution of the proceedings, and was not only authorized to hear and determine the question of *fact* as to whether or not the property which had been seized and libeled was the property of Ben-

jamin, as it was alleged to be, and as the court did find that it was his property, and did condemn it as such, and declare it forfeited to the United States, and order it to be sold, it seems to us that the decree of condemnation and sale must be conclusive in a collateral action in favor of a *bona fide* purchaser at the judicial sale of the same.

"It has not been thought necessary" (says Mr. Justice Baldwin, in Voorhies *v.* Bank of the United States, 10 Pet., 477, 478) "to review the various cases cited in the argument. The principles which must govern this and all other sales by judicial process are general ones, adopted for the security of titles, the repose of possession, and the enjoyment of property by innocent purchasers, who are the favorites of the law in every court and by every code."

"The purchaser is not bound to look beyond the decree, when executed by a conveyance, if the facts necessary to give jurisdiction appear on the face of the proceedings, nor to look further back than the order of the court. If the jurisdiction was improvidently exercised, or in a manner not warranted by the evidence before it, it is not to be corrected at the expense of the purchaser, who had a right to rely upon the order of the court, as an authority emanating from a competent jurisdiction. 2 Pet., 163."

And in Grignon *v.* Astor, 2 How., 319, and in Sargeant *v.* The State Bank Ind., 12 How., 386, 387, it is said: "Titles acquired under the proceedings of courts of competent jurisdiction must be deemed inviolable in collateral actions, or none can know what is his own."

It would therefore seem to be very clear that the title of the purchaser, under the decree of condemnation and sale relied on in this case, must be respected and protected. For the jurisdiction of the court was fully apparent on the face of the record, as every fact necessary to confer jurisdiction was set forth and alleged therein, and the purchaser was therefore not bound to look further back than the decree which authorized and directed the sale of the *res* itself—the two squares of ground, the property of J. P.

Benjamin—and not some special or qualified interest therein.

From the proceedings the purchaser found that it was not only charged that the two squares of ground which had been seized and proceeded against, by proceedings which also run against *all persons lawfully intervening therein for their interest in the same*, were the property of Benjamin, but he also found that the decree of condemnation and sale expressly declared that they were the property of J. P. Benjamin.

This, it seems to us, must conclude the question as to the ownership of the property in a collateral action, and that the purchaser at the judicial sale of the same had a right to rely upon it as conclusive of the matter.

Whether the decree was right or wrong was not a matter with which he had any concern. The fact of the title and ownership of the property was a matter which the court alone was not only authorized but absolutely required by the act to find and determine as an indispensable prerequisite to the condemnation of the property.

And as the court did find the two squares of ground proceeded against to be the property of J. P. Benjamin, and did condemn them as such, and order them to be sold, we submit that the purchaser at the judicial sale thereof took an absolute title to the same. For a decree of condemnation and sale *in rem*, according to all the authorities, gives an absolute title to the purchaser discharged of all claims from all persons whatsoever.

In Gelston *v.* Hoyt, 3 Wheat., 318, Mr. Justice Story, in a most elaborate and well-considered opinion, says: "When property is seized and libeled as forfeited to the Government, the sole object of the suit is to ascertain whether the seizure be rightful, and the forfeiture incurred or not. The decree of the court in such case acts upon the thing itself, and binds the interest of all the world, whether any party actually appears or not. If it is condemned, the title of the property is completely changed, and the new

title acquired by the forfeiture travels with the thing in all its future progress."

And in the case of the Nassau, 4 Wall., 461, this court, in speaking of the effect of a condemnation *in rem*, said: "All claims to the property are by it adjusted."

For a suit *in rem* is founded upon a right in or to the thing itself which is seized or impleaded as the defendant. 1 Blackst. R., 580, 581; 4 Wall. 427. Hence there is no personal defendant in a proceeding *in rem*. 24 How., 436; Gilpin, 313; 2 Wall., 216; 2 How., 338; 18 How., 503; Miller's Ex. *v.* United States, 11 Wall., 268.

But all persons who have any claim upon or right in or to the thing may, if they choose, come in as claimants and propound their interest in the thing, and be heard, and are, therefore, deemed parties, and bound accordingly, whether they come in or stay out. 24 How., 456; The Mary, 9 Cranch, 144, 145; 3 Sum., 309; Gelston *v.* Hoyt, 3 Wheat., 311, 313; The Hendrick Hudson, 17 Law Rep., 107.

For, according to all the authorities, seizure of the *res* and the filing of the libel gives jurisdiction *in rem*. Tyler *v.* Defrees, 11 Wall., 331; Miller *v.* United States, *ib.*, 268; Cooper *v.* Reynolds, 10 *ib.*, 308; Freeman *v.* Howe, 24 How., 459.

The thing itself is, then, in the custody of the law, to abide such order as the court may make concerning it.

In Buchanan *v.* Biggs, 2 Yeates R., 233, 234, the court said: "This court cannot enter into the inquiry, whether the six casks of whisky were legally seized or not. It appears by the judgment of a proper tribunal, having full and competent jurisdiction of the matter in question, that the whisky was condemned as forfeited. That sentence is conclusive against the present plaintiff, and cannot be unraveled or revised in any State court, on principles of established law and sound policy. The plaintiff might have contested the seizure in the district court of Virginia by filing his claim there, and having failed to do so, he is precluded from trying the question in this collateral way. This is no new case. 2 Blackst. R., 977; Hard. 194; T.

Raym., 336; Carth., 323, 327; 12 Vin. Abr., 95. Authorities may be found in the books wherein this doctrine is pointedly asserted."

It is the seizure, and not the lawfulness thereof, that determines the jurisdiction of the court. When the property is seized it is, in contemplation of law, in the custody of the court in which the proceedings are instituted, and remain there to abide the decision of the court as to whether or not it had been lawfully seized, and was liable to be condemned for the causes set forth in the libel. If found to have been lawfully seized, it is condemned and sold as a matter of course. But on the other hand, if it is found that it was not liable to seizure and condemnation, it is restored, as a matter of course, to the claimant who has established his title to the same. And in either case the decree of the court, whether of condemnation or restoration, is conclusive. Gelston *v.* Hoyt, 3 Wheat., 246.

It is therefore seen that the jurisdiction of the court does not depend upon the lawfulness or unlawfulness of the seizure, as that is a matter for the determination of the court after jurisdiction has attached, by reason of the fact of seizure and the institution of the proceedings in court, for most undoubtedly jurisdiction must exist in the court before it can have the right to try and determine the lawfulness or unlawfulness of the seizure. The lawfulness or unlawfulness of the seizure, then, cannot be regarded as a proper criterion in determining the jurisdiction of the court. It is the fact of seizure and the institution of proceedings which give jurisdiction *in rem*—give the court the right to determine whether the seizure was lawful or unlawful, and the property liable to condemnation or restoration; for unless seizure and the filing of the libel gives jurisdiction *in rem*, without any reference as to whether the seizure was lawful or unlawful, there never could be an adjudication of an unlawful seizure, and the property which had been unlawfully seized could not be restored if the court had no jurisdiction of an unlawful seizure.

From the very necessity of the case, then, jurisdiction

must attach as well where the seizure is unlawful as where it is lawful.

And when once property is seized and proceeded against in the proper court, to ascertain whether or not it was liable to seizure and condemnation, all the world are parties; that is, all persons who have any claim to assert in or to the thing are bound to come in and establish their claims, as they have constructive notice by the seizure, and are therefore deemed parties, and bound accordingly.

In a proceeding *in rem* no actual notice is necessary. Thompson *v.* Steamboat Morton, 2 Ohio State R., 30; Monroe *v.* Douglass, 4 Sandf. Ch. R., 126; The Globe, 2 Blatch., 427.

For seizure alone is notice. The Mary, 9 Cranch, 120, 144; Hollingsworth *v.* Barbour, 4 Pet. 475; Heating *v.* Spink, 3 Ohio State, 114, 115; Thompson *v.* Steamboat Morton, 2 Ohio State, 30; Scott *v.* Sherman, 2 William Black, 977.

In the case of Mary, (9 Cranch, 126, 144,) Chief Justice Marshall says: "Where these proceedings are against the person, notice is served personally or by publication; where they are *in rem*, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary, and because it is the part of common prudence for all those who have an interest in it to guard that interest by persons who are in a situation to protect it. Every person, therefore, who could assert any title to the Mary has constructive notice of her seizure, and may be fairly considered as a party to the libel."

In Hollingsworth *v.* Barbour, 4 Pet. 475, the court said: "The law regards the seizure of the thing as constructive notice to the whole world; and all persons concerned in interest are considered as affected by this constructive notice."

In Keating *v.* Spink, 3 Ohio State (N. S.) R., 114, 115, the supreme court of Ohio has well and forcibly said: "Possession is the essential element upon which the juris-

diction of the court depends, and as this possession is deemed that of the sovereignty under whose authority the court sits, if any question can be regarded as settled by the unanimous opinion of courts and jurists, it is this: that the law regards the seizure of the thing as constructive notice to the whole world. (Hollingshead *v.* Barbour, 4 Pet., 475.) Other means for giving notice may be provided at the discretion of the sovereign power, upon the observation of which the jurisdiction may or may not depend; but where they are not prescribed, the power of the court over the thing when taken into custody of the law is perfect and complete, and the final disposition of it binding upon the world."

And in the case of New Orleans, &c., *v.* Hemphill, 35 Miss R., 24, Chief Justice Smith has well said of notice resulting from a seizure of land: "As a general principle, notice, either actual or constructive, to the party affected by the judgment of the court, is essential to its validity. But there is an exception to this rule, recognized at the common law and by the jurisprudence of this State. This exception applies to the class of cases styled proceedings *in rem*, or suits in the nature of proceedings *in rem*.

"In these proceedings or suits, the judgments of the courts are conclusive against all persons interested in the subject-matter of the suit, whether they have had notice of the proceeding or not. And their validity and conclusiveness rest upon a principle of public policy. In these cases it is considered that jurisdiction of the parties in interest is acquired by a seizure of the thing which is the subject-matter of litigation, and on which judgment is to operate. The seizure of the thing is considered notice to all parties interested."

Seizure alone is therefore constructive notice to the whole world; and the whole world, that is, all persons whatsoever who have any claim or interest to assert in or to the thing, are affected by this constructive notice, (and have also notice by the publication of monition and proclamations in court,) and have the right to come in and

assert their claims if they choose, and are therefore deemed parties, and bound accordingly. 1 Greenl. Ev., sect. 325.

In the case of the New York and Virginia Steamship Company *v.* Calderwood *et al.*, 19 How., 239, 241, this court said that the proper course for a mortgagee of a vessel when proceeded against *in rem* was to appear and claim the property, or when the same had been sold and the money paid into the court, to apply for payment out of the proceeds, and that the authority of the court was ample for that purpose, even though the mortgage could not have been enforced in the first instance as a separate independent suit.

And in the Moses Taylor, 4 Wall., 634, 631, the court says: "Sound policy, as well as the law of prize, * * * requires that all demands against captured property must be adjusted in a prize court, and that the property arrested as prize shall not be attachable at the suit of private parties. If such parties have claims which in their view override the rights of captors, they must present them to the prize court for settlement."

All parties, then, who had any right or claim upon the thing were bound to come in and file their claim, or stand forever concluded by the decree.

For "where property is brought into a court of admiralty for adjudication upon a seizure for a forfeiture or other cause cognizable there, the property is, in contemplation of law, in the custody of the court, and cannot be withdrawn from its possession but by some person who shall establish a title to receive it." The Eugenie, 2 Mason, 436. Per Story J.

And in the case of the United States *v.* 422 Casks of Wine, 1 Pet., 547, 550, it is *held* that a party must put in his claim under oath before he can be heard, and that even then the court will not restore the property to such claimant, even if plaintiff fails in his case, and the evidence shows that the property belongs to some one else who is not before the court.

From the very necessity of the case, therefore, all par-

ties who have any claim, either upon the thing or its proceeds, are bound to come in and establish their claims, as the Government holds the property proceeded against subject only to the lawful claims of all persons who choose to come in and establish their right to the property or its proceeds.

Whether a party in interest, then, comes in or stays out, he is equally concluded by the decree, which, as has been said by the court in Parker *v.* Overman, 18 How., 140, "is conclusive against the absent claimant as well as the present contestant."

"And having neglected" (as was said by Mr. Justice Blackstone in Scott *v.* Sherman, 2 Wm. Blackst., 977, "this opportunity of putting in his claim, and trying the point of forfeiture, it was his own *laches*, and he shall forever be concluded by it, not only in respect to the goods themselves, but every other collateral remedy for taking them."

"The decree of the court in such case acts upon the thing itself, and binds the interest of all the world, whether any party actually appears or not." Gelston *v.* Hoyt, 3 Wheat., 318.

A judgment *in rem* is therefore conclusive as to all matters of right and title which it professes to decide. Story's Confl. of Laws, §§ 591, 592, and the numerous cases there cited.

"Whatever the court settles as to the right or title, or whatever disposition it makes of the property by sale, revendication, transfer, or other act, will be held valid in every other country." Story's Confl. of Laws, § 592.

It is the dominion of the suit over the thing itself, says this court, in The Moses Taylor, 4 Wall., 427, which gives the title made under its decree validity against all the world. It is the *thing itself* which is sold in a proceeding *in rem*, and not any particular interest in the same which distinguishes a sale *in rem* from a sale on execution or other process under a judgment *in personam*, where only the actual interest of the defendant is sold, because in the case

of a judgment *in personam*, the court decides nothing as to the ownership of the property and the execution or other process only authorizes the officer to seize and sell the interest of the defendant, and does not authorize and direct the sale of some specific thing, and the title or status of which has been judicially established, as is always the case in a proceeding *in rem*. Castrique *v.* Imrie, Law Rep., 4 H. L., 414; Imrie *v.* Castrique, 98 Eng. C. L., 405; The Moses Taylor, 4 Wall., 427; Buck *v.* Colbath, 3 Wall., 334, 343, 344, 336.

In Buck *v.* Colbath, 3 Wall., 334, 346, it was *held* that the question of title was not involved in an attachment suit, and that "the whole proceeding was carried through without once requiring the court to consider the question of title to the property," and that nothing "more is involved or concluded by such proceedings than such title to the property as the defendant in attachment had when the levy was made." And Megee *v.* Beirne, 3 Wright, 50, 62; Childs *v.* Digby, 12 Harris, 23; and Safford *v.* Beatty, 12 Ohio State, 189, 196, also show that an attachment is *not* a proceeding *in rem*, and decides nothing as to the title, and concludes no one except the actual parties to the suit and those claiming under them.

And so, in a suit to foreclose a mortgage, and in the proceedings of a probate court ordering that the estate of the deceased be sold to pay debts, the court decides nothing as to the title or owhership of the property mortgaged, or as to the title and ownership of the estate of the deceased which is decreed to be sold, but merely orders in the one case, on rendering a moneyed decree, that the property mortgaged be sold to pay and satisfy the decree, and in the other case merely decrees that the estate of the deceased, whatever it may be, be sold to pay the debts. Cases of this description, therefore, lack the essential elements of a proceeding *in rem*, as they neither assume nor pretend to exercise any authority over the property beyond that of the title of the actual defendant or parties to the same.

But a proceeding *in rem* under the statute is an adju-

dication upon the status of some particular thing, and, *ipso facto* renders the thing adjudicated upon what the judgment declares it to be, and concludes all persons whatsoever from ever after disputing or saying that the status of the thing adjudicated upon was not such as the decree has declared it to be. 42 Me., 444; 20 Vt., 85; 3 Hurls. & Nor., 617; 35 Miss. 17; 2 Smith's L. C., 660, 827, 828, 6 Am. ed. For the act expressly says that when the property is condemned it shall become the property of the United States, and may be disposed of as the court shall direct.

When, therefore, it was provided in the act that proceedings *in rem* were to be instituted against the property after the same had been seized, and it was also required that such "proceedings shall conform as nearly as may be to proceedings in admiralty or revenue cases," it is evident that the proceedings were to be attended with and that the same consequences were to follow and attach which attached in other cases of proceedings *in rem* in the admiralty or revenue cases.

The words *in rem* are technical terms, and have from time immemorial had a well-known meaning and signification. And when well-known terms of the law are used in the Constitution or statutes of the United States, and are not defined in the same, they are to be understood in the sense in which they were known and used in the law. 2 Day's R., 167, 211, 212; 3 Wheat., 610, 630; 18 How., 272, 280; *ib.*, 307, 311, 313; 10 Missouri, 520, 527; Law Rep., 7 Exchcq., 293.

Evidently, then, when the act required that proceedings *in rem* should be instituted in the proper court, and that such proceedings should conform as nearly as may be to proceedings in admiralty or revenue cases, it was intended that the same should be attended with all the consequences of and have the same conclusive effect as proceedings *in rem* in admiralty or revenue cases.

The act (says Mr. Justice Miller, in Tyler *v.* Defrees, 11 Wall., 345) was "founded on the principle of confiscating

enemy property," and "was designed to introduce the principle of confiscating enemy property seized on land like that on water, applying the confiscation, however, to the property of a limited class of enemies instead of to all enemies. It was conceived that the proceedings should be, in its essential features, analogous to those which the courts of admiralty were accustomed to use in property captured at sea."

Now, when property is captured on the ocean the captor is bound to send in the prize, "in order that a judicial inquiry may be instituted to determine whether the capture was lawful, and if so, to settle all intervening claims of property.

"Until there is a sentence of condemnation or restitution, the capture is held by the Government in trust for those who by the decree of the court may have the ultimate right to it." The Nassau, 4 Wall., 641. And a further reason for condemnation, as stated by Chancellor Kent, (1 Kent's Comm., 113, 10th ed.,) is, "The purchaser must be able to show documentary evidence of the fact to support his title."

Of course, then, as the act was designed to introduce the principle of confiscating enemy property seized on land, like that captured on the ocean, and the same form of proceedings *in rem* were to be instituted, and in the same courts, it follows, of course, that the object of the proceedings were to determine whether or not the property which was proceeded against had been lawfully and properly seized, and was liable to condemnation, and if so, it was then to be condemned as enemy's property, and become the property of the United States, to the exclusion of all the world.

And as the condemnation in a prize case is conclusive evidence against the whole world that the property condemned and sold is enemies' property, it follows that a condemnation in a proceeding *in rem*, under the statute, as enemies' property, is equally conclusive against all the world of all the facts adjudicated or that were necessary

to be adjudicated before the decree of condemnation was pronounced.

The decree of condemnation, as all the matters that were necessary to bring the power of the court into action were set forth in the record, "was an adjudication upon all the facts necessary to give jurisdiction," and "in such case the decision of the court is conclusive." Comstock *v.* Crawford, 3 Wall., 396, 406, 405; Betts *v.* Bayley, 12 Pick., 583.

For the finding of the facts by the court, like the finding of a jury, is conclusive *even* on a writ of error. United States *v.* King, 7 How., 845.

Much more, then, must the finding of a court be conclusive in a collateral action. And this especially in a case of default. For where no one comes to claim property which has been seized and libeled as forfeited, or as liable to condemnation as enemies' property, it is condemned as a matter of course. The Mary, 9 Cranch, 142; 2 Conk. Adm., 192, 193, 2d ed.

"By the rules of the court" (said Chief Justice Marshall, in the Mary, 9 Cranch, 142) "the condemnation of the vessel was inevitable; not because in fact she was British property, but because the fact was charged, and was not repelled by the owner, he having failed to appear and put in his claim." See 35 N. Hamp. 132.

"All persons who have, or pretend to have, any interest in the thing proceeded against, are cited to appear and answer the libel." 2 Conk. Adm., 191, 2d ed. And "if no claimant appears, the libel is adjudged, to be taken *pro confesso* against all persons whatever." *Ib.*, 192–'3.

The default and *pro confesso* was not against Judah P. Benjamin alone, but all the world. The language is: "The delay allowed by law having expired, and no claim or defense having been filed, on motion of the district attorney it is ordered that all persons interested in the property seized be pronounced in contumacy and default, and the libel adjudged and taken *pro confesso.*" Rec., 31–'2. All persons interested in the property seized are therefore concluded by this default and *pro confesso.*

We do not think, then, that it can properly be said collaterally that the court could only condemn such interest as the party actually had, as all claims to the property were adjusted by the decree which found the *fact* that it was the property of Benjamin. To reopen and retry what had already been tried and settled by the decree of condemnation *in rem*, would be to unsettle judicial sales and titles, and to deprive the decrees of a competent court of that legal force and validity which they have hitherto been universally supposed to possess.

In Williams *v.* Armroyd, 7 Cranch R., 423, 432, Chief Justice Marshall holds this emphatic language: "It appears to be settled in this country that the sentence of a competent court proceeding *in rem* is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of co-ordinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law can never arise, for no co-ordinate tribunal is capable of making the inquiry. The decision in the case of Hudson & Smith *v.* Guestier, reported in 6 Cranch, is considered as fully establishing this principle."

And Judge Story, in Bradstreet *v.* Neptune Ins. Co., 3 Sum., 600, well says: "It does not strike me that any sound distinction can be made between a sentence pronounced *in rem* by a court of admiralty and prize, and a like sentence pronounced by a municipal court upon a seizure or other proceeding *in rem*. In each case the sentence is conclusive as to the title and property, and it seems to me that it must be equally conclusive as to the facts on which the sentence professes to be founded. This, I think, is the settled doctrine in England and in the courts of the United States. It is a just result from the whole reasoning in Rose *v.* Himely, 4 Cranch R. 241; The Mary, 9 Cranch R., 126, 142 to 146; and Gelston *v.* Hoyt, 3 Wheat. R., 246."

And in Imrie *v.* Castrique, 98 Eng. C. L., 405, and Castrique *v.* Imrie, Law Rep., 4 H. L., 414, it was *held*, both by the Exchequer Chamber and House of Lords, that the purchaser of a British ship, which had been sold under a decree *in rem* in France, took an absolute title, and that a *mortgagee* whose claim had, through an error of both law and fact, been rejected by the French court, could *not* maintain an action, even in England, (and by whose laws he had the superior title,) for the recovery of the ship, as it was the *thing* itself, the ship, which had been sold by the order of a competent court, and whose errors and mistakes in ordering and decreeing the sale could not be revised and corrected by any other court in a collateral action.

This case is a striking illustration of the rule that a sale under a judgment *in rem* passes the property to a purchaser under the same, free from the claims of the owner, even when the same has been condemned through error and mistake, and was not, in point of law or fact, liable to be seized, condemned, and sold in such a proceeding.

"The whole law" (says the court in Goddard *v.* Gray, Law Rep., 6 Q. B., 132, 133) "was much considered and discussed in Castrique *v.* Imrie, Law Rep., 4 H. L., 414, 448, where the French tribunal had made a mistake as to the English law, and under that mistake had decreed the sale of the defendant's ship.

"The decision of the House of Lords was that the defendant's title derived under that sale was good notwithstanding that mistake; Lord Colonsay pithily saying, 'It appears to me that we cannot enter into an inquiry as to whether the French court proceeded correctly, either as to their own course of proceeding or their own law, nor whether under the circumstances they took the proper means of satisfying themselves with respect to the view they took of the English law. Nor can we inquire whether they were right in their view of the English law. The question is whether, under the circumstances of the case, dealing with it fairly, the original tribunal did proceed against the ship, and did order the sale of the ship.'"

So, in this case, the only question is, did the court proceed against the square of ground, (against which it is sought to enforce the mortgage,) as the property of Benjamin, and did it condemn it as his property and order it to be sold.

But the decree of condemnation and sale in this case is (if such a thing were possible) stronger and more conclusive in favor of the purchaser than that in the above case of Castrique *v.* Imrie, as it was a condemnation and sale aftes a regular default was entered and a *pro confesso* taken against all persons whatsoever.

And a default and a *pro confesso* establish all the facts averred in the information as fully and completely as they can be established on a regular trial of the case, and are a virtual confession and admission of record by all parties in interest that the facts averred therein are true; and the court, therefore, is as fully warranted in rendering the decree as if the facts charged had been expressly found, on issue, to be true. Miller *v.* The United States, 11 Wall., 301, 303, 304.

And that which is admitted or confessed cannot afterwards be controverted or denied.

And the general principle is that a judgment on demurrer, confession, or verdict concludes the party forever. Aurora City *v.* West, 7 Wall., 99.

A sale under a decree, then, by default, must be as good and as conclusive as one under a decree after a hearing of all the parties, which is universally conceded to be conclusive.

It is therefore seen that a sale under a decree *in rem*, according to all the authorities, vests an absolute title in the purchaser.

III.

There can be no doubt that these defendants in error might have interposed their mortgage and had their rights adjudicated. Not having done so, they are bound. This court has held, *Beloit* v. *Morgan*, before clted, that a judg-

ment by default is a conclusive estoppel against the defendants in regard to every defence he might have interposed, by plea or otherwise. As to such matters the defaulted defendant has had his day in court. So here, if the defendant in error might have intervened, of which there can be no doubt, then they have had their day in court, and are estopped.

In Hobbs *v.* Henning, 17 Com. Bench., 791, 823, (112 Eng. C. L., 791, 821, 822,) Chief Justice Earle said: "The rule making the decision of a court which creates the status of a person or thing conclusive upon all persons as to the existence of that status, has been regarded as salutary. Sentences of nullity of marriage in the ecclesiastical courts, of forfeiture in the exchequer, of settlements of paupers by the quarter sessions, and of prize in prize courts are examples."

MATT. H. CARPENTER,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

No. 180. OCTOBER TERM, 1873.

L. MADISON DAY, PLAINTIFF IN ERROR,

vs.

T. MICOU ET AL., DEFENDANTS IN ERROR.

PETITION FOR REHEARING.

The petition of L. Madison Day, plaintiff in error in the above-entitled case, respectfully asks for a *rehearing* of this case, (as the questions involved are of great public importance,) on the following grounds:

First. The first ground upon which the court is asked to reconsider its opinion is in holding that the property was confiscated for *crime*, or as the property of an *offender*, so as to be within the words of the joint resolution limiting the forfeiture of the real estate of the offender to the period of his natural life.

Second. The second point upon which the court is asked to reconsider its opinion, is in holding that the mortgage could be enforced against the property in the hands of a *bona fide* purchaser, at a judicial sale of the same under a decree *in rem*, for the following reasons:

Because the decree of condemnation and sale is conclusive evidence, in a collateral action, in favor of a purchaser under the decree, of the lawfulness of the seizure, and the liability of the property to condemnation and sale; and that the property condemned and sold passed to the purchaser free from the claims of all persons whatsoever.

Petitioner further shows that, although the certificate in

this case has been sent down under the general order made by the court in January last, when it adjourned over until the first Monday in March, 1874, the judgment has not been executed, and cannot, according to the laws of Louisiana, be executed until at least thirty days' advertisement of the property for sale by the sheriff after he shall have seized the property. That no seizure has yet been made by the sheriff, and that none can be made until ten days after petitioner shall have been notified to abandon said property or pay the judgment, and that the rights of no third parties will be varied or affected by the granting of a *rehearing* and a recall of the certificate.

Petitioner further shows that he was wholly unaware of any usage or practice of the court to order that certificates might issue on the court taking a recess, and verily believed, from an examination of the authorities, that an application for a rehearing would be in time if made during the term, and before the judgment was or could be executed.

That as soon as he was advised of the decision in this case, he telegraphed the clerk of this court from New Orleans to send a copy of the opinion immediately, but that he did not receive the same until after the court had adjourned over for a recess, and that petitioner was not in consequence thereof able to prepare his application for a rehearing.

Petitioner further shows that this application is not made for delay, but for the ends of justice.

Petitioner further shows that he herewith files a printed argument in support of this application for a rehearing, which petitioner prays may be considered as a part of this petition; and that a *rehearing* may be allowed, the certificate recalled, and for all equitable and general relief in the premises.

L. MADISON DAY.

UNITED STATES OF AMERICA, *District of Columbia.* } *ss:*

L. Madison Day, being first duly sworn, on oath says

that he has read the foregoing petition signed by him, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and that as to those matters he believes them to be true.

Subscribed and sworn to this 10th day of March, A. D. 1874.

T. D. ANDERSON,
U. S. Commissioner.

United States Supreme Court.

IN THE MATTER, &c.,

OF

EDWARD LANGE.

POINTS FOR PETITIONER.

ARNOUX, RITCH & WOODFORD,
Attorneys for Petitioner.

WM. HENRY ARNOUX,
Of Counsel.

NEW YORK:
LANGE, LITTLE & CO., PRINTERS,
108 TO 114 WOOSTER STREET.
1874.

Oct T 1873

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Supreme Court of the United States.

In the Matter, etc.,
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EDWARD LANGE.

Points for Petitioner.

STATEMENT OF FACTS.

The petitioner was indicted under an Act of Congress, passed 8th June, 1872 (17 U. S. Statutes at Large, p. 320, § 290), for stealing, purloining, embezzling, and appropriating to his own use certain mail bags belonging to the Post Office Department. Upon the trial, on the 22d day of October, 1873, the jury found him guilty of appropriating to his own use certain mail bags, the value of which were less than twenty-five dollars, but the clerk entered a general verdict of guilty, the punishment for which, as provided in said statute, is imprisonment for not more than one year, *or* a fine of not less than ten dollars, nor more than two hundred dollars. On the 3d day of November, 1873, Hon. Charles L. Benedict, District Judge, presiding, sentenced the petitioner under said conviction to one year's imprisonment, *and* to pay two hundred dollars fine. The petitioner was on said day committed to jail in execution of the sentence, and on the following day the fine was paid to the Clerk of the court, who, in turn, and on the 7th day of November, 1873, paid the same into the Treasury of the United States.

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On the 5th day of November, 1873, the Hon. Samuel Blatchford granted a writ of *habeas corpus*, returnable to the United States Circuit Court on the 8th day of November, when the illegality of the sentence was acknowledged by Judge Benedict, who, nevertheless, dismissed the writ. He then, upon his own motion, without permitting counsel for the prisoner to be heard, but, on the contrary, absolutely denying the request, vacated the sentence pronounced, and re-sentenced the petitioner to one year's imprisonment from the 8th day of November, without regard to the fact that he had been imprisoned five days already, and without providing for any restoration or recompense to him for the fine already imposed and paid.

The petitioner thereupon presented his petition to the Hon. Ward Hunt, Associate Justice of the Supreme Court of the United States, to have him review the acts of the Circuit Court, and to do justice to the petitioner.

After considering the application, Judge Hunt, as a matter of practice, denied the petition on the ground that application should be made in the district.

Thereupon the petition was presented to the Hon. Lewis B. Woodruff, who made it returnable before the United States Circuit Court in the city of New York, when it was heard by the three judges, and upon deliberation the writ was vacated and the prisoner remanded for the reasons appearing in the opinion of the court annexed to the return.

The petitioner thereupon presented his petition to the Supreme Court of the United States for writs of *habeas corpus* and *certiorari*, and the proceedings of the Circuit Court are now before this Court.

POINTS.

I.

Whether the verdict stand generally "guilty," as entered on the minutes of the Court, or it be the special verdict that the jury did in fact render, the sentence of the court can only be pronounced upon the one indictment as a unit, and for only one conviction and punishment.

United States *v.* O'Callaghan, 6 McLean, 596.
Young *v.* King, 3 Term, 98.
Rex *v.* Robinson, 1 Moody, C. C. R., 413.
Kane *v.* People, 8 Wend., 203.
People *v.* Costello, 1 Denio, 83.
Commonwealth *v.* McCord, 2 Dana, 242.
State *v.* Kibby, 7 Miss., 317.
State *v.* Bitting, 13 Iowa, 600.
Orr *v.* State, 18 Ark., 540.
Buck *v.* State, 1 Ohio St., 61.
Woodford *v.* State, 1 Ohio St., 427.
State *v.* Gummer, 22 Wis., 441.
Com. *v.* Manson, 2 Ash., 31.
State *v.* Croteau, 23 Vt., 14.
Com. *v.* Tuttle, 12 Cush., 505.
Bishop Criminal Procedure, § 452.

It is, however, now only necessary on this point to recall the argument of the able counsel, and the opinion of the Hon. Noah Davis, in the Tweed case, so recently concluded in the State of New York, and to cite the declaration of the Hon. Charles L. Benedict himself, that there was but one conviction, that he had charged the jury only in respect to some one transaction,

and intended in the sentence pronounced to punish for one conviction only.

Whatever may have been the intent or action of the judge under a conviction when the jury find the value of the property to be less than twenty-five dollars, there can be only one sentence and punishment. The law expressly says, where the value of the property is more than twenty-five dollars the prisoner shall be deemed guilty of a felony, and *for each offence* shall be imprisoned not less than three years. But these words *for each offence* are omitted where the party is guilty of a misdemeanor only, and, therefore, for the whole offence he can be only sentenced for one year, or fined $200 as the highest penalty of his conviction.

II.

The original sentence pronounced upon the petitioner was illegal, and it was the duty of the Court to discharge the petitioner whenever the illegality of the sentence inflicted was made to appear.

> Under the law the alternative was given to the judge who pronounced sentence, either to impose a fine or to imprison; he could not do both. It therefore becomes a grave question for consideration, whether the effect of a double sentence is to render illegal the whole or the excess of punishment, and, if the latter, what is the excess of punishment in this case?

First. We contend if any part of the sentence can stand, then that which is last shall

stand in preference to that which is first, upon the principle applicable to wills, which is too familiar to all to need any citations of authority, that that which is last expresses the final thought and intention, and, *pro tanto*, is a revocation of whatever precedes it inconsistent therewith. So that if any part of this sentence could stand, the infliction of the fine subsequent to the imprisonment, the fine being under the law in full satisfaction of the crime of which the petitioner had been found guilty, must of necessity be the whole punishment, especially where, as in this case, the fine has been paid to and accepted by the United States in satisfaction of that part of the sentence. For, as the property appropriated belonged to the United States, and was of less value than $25, the payment not only expiated the crime, but it also wrought reparation to the party wronged, in a higher degree than the fourfold reparation of the Mosaic Law.

Second. The sentence pronounced is an entirety, and if it exceeds the punishment provided by law is wholly illegal.

Rex *v.* Ellis, 5 B. & C., 395.
The King *v.* Bourne, 7 Ad. & E., 58.
The Queen *v.* Silversides, 3 Q. B., 406.
King *v.* The Queen, 7 Q. B., 795.
Holt *v.* Regina, 2 D. & L., 774; 9 Jur., 538.
Ex parte Page, 49 Mo., 291.

The King *v.* Ellis, 5 B. & C., 395.

Error from conviction. The prisoner was charged in one count with stealing, and in another count with stealing from his mistress. The jury having found the prisoner guilty upon the indictment generally, the court adjudged that he be transported to parts beyond the seas for the term of fourteen years. Chitty, for the prisoner, contended that the conviction was for a petit larceny, and was punishable only for seven years. Parke, for the crown, claimed that, although the judgment was excessive, it was good for the part which was warranted by law, and bad for the residue, and that the prisoner ought to be remanded to the court below, in order that the proper judgment might be given.

Abbott, Ch. J. (afterwards Lord Tenterden), delivering the unanimous opinion of the court, says, "The judgment of the court below is more severe than that which is authorized by law. But it is said that the judgment is good for seven years' transportation; but I cannot assent to that proposition. If the prisoner is sent out of the country for fourteen years, who is to say that he is to be discharged at the end of seven? It has been further urged that the prisoner may be remanded to the court below, and there receive the proper sentence, that having been done in Rex *v.* Kenworthy, 1 B. & C., 711; but there is this material distinction between the two cases. there no judgment whatever had been passed in the court below, and this court therefore

ordered the prisoner to be remanded to the inferior court in order to receive judgment. But here the court below has passed a judgment, and that judgment being erroneous, we think there is no ground to send it back to be amended. The consequence is that the judgment pronounced by the court below must be reversed."

The King *v.* Bourne, 7 Ad. & E. 58.

Error from Sessions. Prisoners were jointly indicted on two counts, one for burglary and the other for larceny, were convicted on the first count, and were sentenced to transportation, the punishment being death. The prisoners brought error, praying that the judgment might be reversed, and that they might be restored to the free law of the land and to all things which by reason of the judgment and proceedings they had lost.

On the argument the Attorney-General admitted that the judgment was erroneous, and that the only question was whether the court would, under the circumstances, pass the proper sentence, or remit the case back to the sessions. The conviction being lawful, there was no authority for discharging the prisoners. When parties have been properly convicted, no injury can be done to them by pronouncing the proper sentence. Here there is a judgment in form, but it awards

a kind of punishment which no law sanctions in the case of burglary. The sentence, therefore, is rather a nullity than an erroneous judgment; it is as if the court had imposed a penance or a journey to Rome.

The court unanimously held that the prisoners were entitled to judgment of reversal as prayed, and ordered further that they be now severally discharged out of custody as to their commitments in execution of the said judgment.

The Queen *v.* Silversides, 3 Q. B., 406.

Error from conviction. Prisoner was convicted of unlawfully having in his possession certain naval stores, and the statute authorized the punishment to be fine or imprisonment. The judge pronounced sentence, imprisonment and hard labor. The court held the sentence clearly erroneous. Prisoner's counsel thereupon contended that the prisoner could not be remanded to the court below for judgment, a sentence having been pronounced, and that he must be discharged. Counsel for the crown contended that the court below would not be called upon to pass any new judgment contrary to their former sentence, but only to remit so much of it as relates to hard labor.

The court unanimously held that the judgment should be reversed and the prisoner discharged.

King & Queen v Walcott
4 Modern 395-

Holland *v.* Queen, 2 Jebb and Symes R., 357.

Error from judgment on assault. Sentence of solitary confinement was illegally pronounced in addition to the proper punishment. The Court held on the authority of Rex *v.* Bourne that *where a judgment in a criminal case is bad in part it is bad altogether*, and consequently reversed the judgment and discharged the prisoner. The reporter's syllabus qualifying the judgment is not warranted by anything that appears in the opinion of the Court.

O'Leary *v.* People, 4 Park. Cr. R., 187.

In this case prisoner was indicted for and found guilty of an assault, not a felony, and the Court pronounced sentence and judgment as for a felony, and it was held that the case could neither be sent back for the proper judgment, nor for a new trial, nor could the appellate Court amend the sentence; thereupon the Court pronounced a final judgment of reversal and discharged the prisoner.

Shepherd *v.* Commonwealth, 43 Mass. (2 Metcf.) 419.

Writ of error to reverse sentence. Prisoner was indicted and found guilty of larceny, and was sentenced to be imprisoned four years in the house of correction. The statute provided that if the punishment is by imprisonment in the common jail it could not exceed three years if the term of imprisonment exceeds three years it must be in the State prison.

The Court held that the judgment was not warranted by law and was erroneous, and on the authority of *King v. Ellis*, and *King v. Bourne*, held that they could neither send the case back for a new judgment nor render a new judgment, but could simply annul and reverse the erroneous judgment.

Stevens *v.* Commonwealth, 45 Mass. (4 Metcf.) 360.

Writ of error from judgment of conviction. The prisoner was convicted of larceny, and sentenced to two years hard labor, and three days solitary imprisonment in the house of correction. The Court held that by the statute under which the prisoner was convicted, a sentence to imprisonment in the State prison must be partly to solitary punishment and partly to confinement at hard labor; and a sentence which directs no solitary imprisonment is erroneous, and for that error the judgment was reversed.

Fitzgerald *v.* State, 4 Wis., 395.

Writ of Error. Prisoner was convicted of manslaughter in the second degree, the punishment for which, by statute, was imprisonment for a term with hard labor, and in addition thereto, solitary imprisonment for such term as the Court should direct, not exceeding twenty days. The error assigned was that the Court had omitted the solitary imprisonment.

COLE J. "The solitary imprisonment is as much a part of the sentence as the hard labor in the State prison, and both constitute the judgment. It is true, that the sentence was more favorable to the prisoner than the judgment prescribed by the statute, but still he can take advantage of it. *It is not the judgment the statute prescribed*, and therefore erroneous," and ordered that the judgment be reversed.

Fellinger *v.* People. 15 Abb. Pr. R., 128.

Error in the indictment. Held, not only that defect could not be cured by the verdict, but on the authority of People *v.* Taylor, 3 Denio, 97 and Rex *v.* Bowme 7 Ad. & E. 58, that "the judgment here rendered was erroneous and must be reversed," the Court of reversal being neither able to "Give a new judgment against the prisoner, nor send the case back to the court below for the proper judgment."

Ratzky *v.* People. 29 New York, 124.

Writ of Error. Here it is distinctly laid down that by the common law a wrong judgment must be reversed without power of correction; and that the contrary practice in New York, so far as it has power to order a new trial or correct the sentence is derived only by statute. The court (Davies, J.) say: "The judgment in this case was pronounced on the assumption that the prisoner was

to be punished according to the act of 1862. We think this view of the law was erroneous and must be reversed. It would follow from these considerations and the authority of the case of the *People* agt. *Shepherd* (25 N. Y. 406) that, a wrong judgment having been pronounced, although the trial and conviction were regular, this prisoner could not be subjected to another trial and would be entitled to his discharge. *That would unquestionably be so but for the act of April* 24, 1863. In the present case that act became operative before the judgment and sentence were pronounced and given, and before the writ of error was prosecuted to this Court. But for the authority conferred upon this Court by this statute *it would have no power upon the reversal of the judgment of the Supreme Court either to pronounce the appropriate judgment or remit the record* to the Oyer and Terminer to give such judgment. *This is well settled by authority.*"

III.

The first judgment pronounced was not absolutely void; it was valid until vacated, reversed, or altered by some court of competent jurisdiction, notwithstanding its manifest illegality.

The Court had jurisdiction of the subject matter of the action, of the person of the defendant, and at the time and place of the original sentence had jurisdiction to pronounce the judgment of the Court.

This judgment was not void to such an extent as not to afford protection to an officer of the law, who sought to put it in execution, while it remained as part of the record of the Court. The defendant would not have been justified in breaking jail or resisting an officer so long as it stood unvacated. It was illegal, and it was the duty of the court so to declare it, but it was not a complete nullity. And here we think is the fundamental error of the Circuit Court in their judgment in this case; they seem to treat it as a matter whereof the court had no jurisdiction whatever, whereas the court did have jurisdiction to pronounce sentence, and only lost it by becoming *functus officio* when the sentence was put in execution.

United States *v.* Arredondo, 6 Peters, 709.

The Court holds: "The power to hear and determine a cause is jurisdiction; it is *coram judice* whenever a case is presented which brings this power into action." This was approved in *Grignon's Lessees v. Astor*, 2 Howard, 338.

Thompson *v.* Tolmie, 2 Peters, 157, 170.

MARSHALL, Ch. J., quoting: "When a Court has jurisdiction, it has a right to decide every question that occurs in the cause; and whether its decisions be correct or not, *its judgment, until reversed, is regarded as binding* in every other Court. But if it acts without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void:—says: "This is the clear and well-settled doctrine of the law."

Voorhees *v.* Bank of the United States, 10 Peters, 449, 472.

In this case the Court holds: "there is no principle of law better settled than that every act of a Court of competent jurisdiction shall be presumed to have been rightly done till the contrary appears. So long as the judgment remains in force, it is in itself evidence of the right of the plaintiff to the thing adjudged; *the errors of the Court, however apparent, can be examined only by an appellate power.*"

Cocke *v.* Halsey, 16 Peters, 71.

In this case the law is thus declared: "The correct legal principle applicable to such proceedings is this, that in every instance in which a tribunal has decided upon a matter within its regular jurisdiction, *its decision must be presumed proper, and is binding until it shall be regularly reversed* by a superior authority. This principle has been too long settled to admit of doubt at this day, and has been repeatedly and expressly recognized in this Court."

The People *ex rel* Davis *v.* Sturtevant, 9 N. Y., 263.

In this case the relators obtained an injunction against the Mayor, etc., of New York, which injunction-order was disobeyed. The defendant was sentenced to be fined and imprisoned for contempt in disobeying the injunction-order, and from that appealed. In the Court of Appeals defendant was represented by David Dudley Field and Charles O'Conor, and the relators by John Van Buren and Samuel Beardsley.

JOHNSON, J., delivered the opinion of the Court, and said: "The first question to be considered is, did the injunction impose any obligation upon anybody? The answer must depend upon the solution of the further question, whether the Superior Court had jurisdiction of the action in which it was ordered to be issued; because the principle is of universal force, that the order or *judgment of a Court having jurisdiction is to be obeyed, no matter how clearly it may be erroneous.* The method of correcting error is by appeal, not by disobedience. A party proceeded against for disobedience of an order or judgment, is never allowed to allege, as a defense for his misconduct, that the Court erred in its judgment. He must go further, and make out that, in point of law, there was no order and no disobedience, by showing that the Court had no right to judge between the parties upon the subject."

The Erie Railway *v.* Ramsey, 45 N. Y., 637.

In this case the defendant was adjudged guilty of a contempt, and fined, from which order he appealed. In the Court of Appeals, Lyman Tremain and R. W. Peckham, Jr., appeared for appellant, and David Dudley Field and Amasa J. Parker, for respondent.

FOLGER, J., delivering the opinion of the Court, said: "This is not a review of the propriety of an order of injunction, nor are we to decide *whether such an order has been hastily, improvidently, or wickedly granted.* If the facts before him (the judge) tended to make a

case, which made, jurisdiction was conferred to grant an order or to refrain from granting one, then, when he decided to grant it, it was not void. It was valid, though it should, on appeal, be held irregular or improvident. *It was entitled to obedience, and disobedience was contempt.*"

In these contempt cases we mention the names of the distinguished counsel who appeared for the respective parties, that the Court may see that the judgments pronounced must have resulted from able and exhaustive discussions of the law.

PATTERSON, J., in The King *v.* Bourne, says: "The court have in form pronounced a judgment; and that being so, if we were to hold it a nullity because it is erroneous, the same might be urged whenever an erroneous judgment came before us." It is a cardinal principle that every judgment is good until the same is vacated or reversed.

Miller *v.* Finkle, 1 Parker's Crim. R., 374.

This was a case to determine the civil rights of the defendants, who were convicted of felony and sentenced to imprisonment for three years and six months. It having been discovered that the termination of this period occurred past the season extending from March to November, prescribed by the statute for the termination of periods of sentences, the next day the Court directed the clerk to expunge the sentence, "and thereupon proceeded to sentence" the prisoners "anew, for the term of three years

and four months." The question came up as to the civil status of the prisoners on the day intervening between the two sentences, on which day they had made an assignment of their accounts.

The Court, PARKER, J., said of the first sentence, that it was not in accordance with the statutory requirement, and proceeded: "The defendants' counsel argues that the sentence was therefore void. But that position is not tenable. The statute is merely directory. There was no want of jurisdiction."

IV.

The petitioner having been removed from the court and incarcerated under the sentence, and having paid the fine in full, the sentence was in part executed, and had become beyond the control of the judge who, or the court that, pronounced sentence.

First, It has been said by some authorities that the court may change the sentence to alter, diminish, or enlarge the same at any time during the term at which it was rendered.

Jane Fletcher's case, 1 R. & R. C. C., 58, is the authority relied on for the statement. This was a conviction for murdering her child, under a statute that made it incumbent on the judge to direct in addition to punishment of death that the body of the prisoner should be delivered up for dissection. By an oversight the judge only pronounced sentence

of death, and he brought before the twelve criminal judges of England, assembled in Lord Ellenborough's Chambers, the question whether that was a substantive or directory part of the sentence; the judges were evenly divided on this point, but were unanimously of the opinion that the judge might have amended the sentence at any time during the assizes.

Although this was not the question reserved, yet it has ever since been quoted approvingly, and has been followed in all the English courts down to 1840.

People *v.* Thompson, 4 California, 238.

Appeal from conviction of murder. At the close of trial the judge sentenced the prisoner to be executed on a certain day, and subsequently amended the sentence by altering the time. This was held good, for the reason, that "it was perfectly competent for the court at any time, before final judgment signed, to amend its judgment, so that either sentence was good."

Here, of course, the sentence was executory.

Jobe *v.* State, 28 Georgia, 235.

Appeal from conviction and sentence. The court, on conviction, pronounced sentence of fine and imprisonment. At request of prisoner a reconsideration was had, and "the defendant, in the meantime was not confined in the jail, the order of the court not having been signed by the judge, nor entered on the

minutes of the court. The prisoner escaped, and, on the last day of the term, the judge pronounced sentence and increased the imprisonment."

It was held competent for the judge so to do, under the circumstances of the case.

It will be observed that the sentences in the cases cited were wholly executory, and the distinction between this and an executed sentence soon presents itself. In the latest and one of the ablest works on Criminal Law, it is laid down thus: "If no steps have been taken to carry the sentence into execution, it may be changed at any time during the term of the court at which it is rendered, and before final judgment is signed or other final act done."

* Bishop Criminal Pro., § 1123.
People *v.* Duffy, 5 Barb., 208.
Com. *v.* Weymouth, 2 Allen, 144.
Howard *v.* People, 3 Mich., 207.
Gurney *v.* Tufts, 37 Maine, 130.
Robson *v.* Spearman, 3 Barn. & Ald., 493.
Miller *v.* Finkle., 1 Parker Crim. Rep. 376.

Archbold in his treatise thus announces the law: "The Court may at any time during the same session or assizes or any adjournment thereof, vacate the judgment passed upon the defendant *before it has become matter of record*, and pass another less or even more severe. *But when once the judgment is solemnly entered on the record, no Court can make any alteration in it.*" And this he declares after citing the case in 6 East, to which reference will hereafter be made.

Archbold's Criminal Pleading, 17th Eng. ed., 176.

People *v.* Duffy, 5 Barb., 208.

Action against surety on recognizance. Error from Common Pleas. John McKeon for plaintiffs, Charles O'Conor for defendant.

Daly, the principal, was charged and convicted of being a disorderly person, and in default of giving sureties as required, the justice made up and signed, but did not file, a record of the conviction, and by his warrant committed Daly to jail until such sureties should be found, or he be otherwise discharged. After such commitment, and after said Daly had been, and whilst he was, in actual custody in jail, in pursuance of conviction and commitment, the justice, on pretence of an authority derived from such conviction, took the recognizance, which defendant claimed was without authority and void. The court so held, and the People brought writ of error to the General Term of the Supreme Court.

Hurlburt, P. J., delivering the unanimous opinion of the court, said: "In our judgment, the magistrate lost all jurisdiction of the matter when he signed the record of conviction, and issued the warrant of commitment; but if this were questionable, we do not entertain a doubt that such jurisdiction ceased when the warrant was executed."

Com. *v.* Weymouth, 2 Allen, 144.

Habeas Corpus. On 18th February, 1861, prisoner was sentenced to confinement for two years; on same day after warrant was issued, but before the service or execution thereof, the court ordered stay of execution.

On the next day, the attorney of the Commonwealth moved a revision of sentence under prisoner's protest, and the court, on further hearing, ordered that the previous sentence be revised, and that prisoner be punished for three and a half years.

"The rule is declared to be, that if it clearly appears that no action has been had on the judgment, or the execution—if one had been issued—has been returned to the files unexecuted, and where the rights of third parties, not parties to the suit, cannot be affected, there is no good reason for refusing to vacate a judgment for sufficient cause, and substituting a new one in its place. This is certainly a safe and reasonable exercise of judicial discretion, which cannot be used to abridge or infringe upon the rights of any one; not on those of the parties to the suit, if a legal and regular judgment only is rendered; nor of third persons, because it cannot be exercised if it operates to their prejudice or injury. The application of this doctrine to the present case is decisive against the claim of the petitioner to his discharge. It is not contended that the court has any less power or control over its records in a criminal case than in one which affects the parties *civiliter* only. Certainly there is no ground for any such distinction. The true test by which to determine whether the power can be executed is to ascertain whether it will affect the legal rights of the parties. If it will not, then it is a legitimate exercise of judicial discretion, of which no one has a right to com-

plain. The petitioner was never taken or charged on the warrant which was issued on the sentence as originally pronounced. That sentence never went into operation, and, in effect, was the same as if it never had been passed. So long as it remained unexecuted it was in contemplation of law, in the breast of the court, and subject to revision and alteration. He was not injured or put in jeopardy by it any further than he would have been by a conclusion or judgment of the court as to the extent of punishment which had not been announced. Until something was done to carry the sentence into execution, by subjecting the prisoner to the warrant in the hands of the officer, no right or privilege to which he was entitled was taken away or invaded by revoking the sentence first pronounced and substituting in its stead the one under which he now stands charged. *If it had appeared that the petitioner had actually been taken and committed under the first sentence, or if he had been thereby condemned to imprisonment in the State Prison, so that the term of his sentence would be computed from the time he was first ordered to remain in the custody of the sheriff*, according to *St.* 1859, *c.* 248, *we might have arrived at a different result;* but on the record as it stands we are all of the opinion that the order must be

Prisoner Remanded."

And this result was not reached until after the case had been thrice argued, as Mr. Russell one of the counsel in the case has informed us.

Queen *v.* Hartnett, 2 Jebb & Symes R., 367, note e.

The prisoners were convicted of murder, and sentence of death was pronounced upon them, without directing that their bodies should be buried within the gaol according to statute. *In the same term, two days after, in open court, the judge corrected the recorded sentence. It was held that the subsequent amendment made the sentence illegal*, and the prisoners were discharged.

Rex *v.* Collier, 1 Wilson, 332.

Habeas Corpus. Defendants were indicted, tried, and convicted of insulting a magistrate. It was adjudged that they should be imprisoned for a month and ask the magistrate's pardon, etc. After imprisonment they were brought up on this writ, and on the ground of execution of part and illegality of the other part, the Court ordered their discharge.

Christian *v.* Commonwealth, 46 Mass. (5 Metcf.), 530.

Writ of Error. Defendant was convicted of stealing, sentenced to two days' solitary imprisonment and confinement, afterwards at hard labor for the term of eighteen months, to commence from and after the expiration of a former sentence of imprisonment awarded against the prisoner at the same term for another offence. The error assigned was, that the crime was simply larceny, for which the prisoner could only be sentenced for one year.

The Attorney-General, for the Commonwealth, contended that as the prisoner had not

yet suffered anything under the sentence, the Court on reversal might enter such judgment as should have been entered in the Court below.

The Court held, "*The fact that the convict has yet suffered no part of the sentence on the erroneous judgment does not vary the case in principle.* If one has suffered a part of the sentence awarded by the erroneous judgment, it may add weight to the reasons why a new judgment should not be pronounced." And reversed the judgment.

People *v.* Taylor, 3 Denio, 91, 97.

In this case the Appellate Court laid down the rule respecting the effect of reversal with perspicuity and succinctness. "When a judgment is reversed for errors on the record, the Court of Review, as a general rule, renders such judgment as should have been given in the Court below. But if a wrong judgment be given against a defendant, which is reversed on error, the Court of Review can neither give a new judgment against him, nor send the case back to the Court below for a proper judgment."

Miller v. Finkle, 1 Parker Cr. R. 374.

The facts of this case have already been given under the third point. On the question whether the court had power to change the sentence, the judge, says the courts "may see that the judgment itself is in conformity to law. If, by inadvertence in pronouncing a sentence, a re-

quirement of the statute has been overlooked, it may be corrected by the same tribunal *before further action is taken*. I think it a safe rule to lay down, that a court of criminal jurisdiction may vacate or modify a judgment at the same term at which it is pronounced, and *before the sheriff has proceeded to execute it*."

The Assistant District Attorney, in a former argument of this question, quoted this case as supporting his view of the power of a court to resentence a prisoner during the same term. He insisted that it was necessary to suppose that the sheriff had proceeded to execute the first sentence, despite the words of the court, which we have italicized, to the contrary. He overlooked the fact that the sentence was pronounced in the Court of General Sessions of Columbia County, and the term of imprisonment had to be served at the State Prison; and also the plain statement of the reporter following: "which last sentence was entered by the Clerk, and under a certified copy *thereof*," the prisoners "*were taken* by the Sheriff to the State Prison."

Second, Whatever may have been the legal effect of that judgment as originally pronounced, in the court in which it was rendered, it became as against the Court and the United States *res adjudicata* by the decision of the court refusing the writ of *habeas corpus*. If that sentence was illegal then Edward Lange had a right to his discharge, but the court on the *habeas corpus* after hearing counsel, decided that the writ must be dis-

missed and the prisoner remanded. That writ of *habeas corpus* brought the matter, not before a judge, but before the court, the very court that had passed the original sentence. It was the only way in which the legality of the sentence could be brought in review in that court, and being brought there, the court expressly and unequivocally adjudged that that sentence was just. From that judgment the United States took no appeal and it stands on the record of that court unreversed.

V.

The power of the court having been exhausted in the sentence first pronounced, the second sentence was wholly without jurisdiction and was in conflict with the Constitution.

First. The Constitution of the United States provides "that no person shall be held to answer * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, * * * nor be deprived of life, liberty, or property without due process of law."

Const. U. S., Art. V.

Under this American Magna Charta if a party had been sentenced to a term of imprisonment, and thereunder imprisoned, and an appellate court having jurisdiction to review the judgment had decided it was erroneous, there could

be no such thing as ordering a new trial. The imprisonment would be a jeopardy that could not be renewed. Can, therefore, the court accomplish by any other process that which it could not thus accomplish to evade this constitutional provision? The prisoner, Edward Lange, is now in jeopardy for the same offence for which he was imprisoned on the sentence of the court prior to the 8th day of November. The court below admit that this is the fact, by declaring that he suffers an inconvenience incidental to the administration of justice. But the Constitution holds its sacred shield over the head of the defendant, and says that there shall be no inconvenience that shall jeopard his liberty a second time for the same offense.

Shepherd *v.* The People, 25 N. Y., 406, 418.

Plaintiff in error was indicted, tried, and convicted of arson, and was sentenced to imprisonment for life. The case was brought up by writ of error that brought up the record alone. The Court of Appeals held that a prisoner against whom a wrong judgment had been pronounced upon a regular trial and conviction, cannot be subjected to another trial. Accordingly, when the judgment is reversed for an illegal sentence upon a conviction in which there is no error, a new trial cannot be ordered, but the prisoner must be discharged, and this though upon a motion in arrest of judgment he asked for a new trial.

The Court says (p. 418): "The constitutional provision is, 'No person shall be subject to be twice put in jeopardy for the same offence' (Const. of State, art. 1, § 6). This provision may be considered as addressed to the Courts; and, if the prisoner is within its protection, he ought to be discharged. The question is, then, whether the prisoner, if the judgment is reversed upon the ground alone that a wrong judgment was given upon a lawful and regular trial and conviction, can *constitutionally* be tried again? *It is clear to me that he cannot.*"

On comparison, it will be found that, in respect to this matter, the provision of the Federal and the New York State Constitutions substantially agree.

Kuckler v. The People, 5 Parker's Cr. R., 212.

Where a conviction had taken place under an Act for an offence committed before the Act took effect, it was held, on reversing the judgment, that this court had no power to order a new trial, but that the prisoner must be discharged. To grant a new trial in such a case would be a violation of the constitutional provision which protects the prisoner from "being twice put in jeopardy for the same offence," and on the second trial the plea *autrefois convict* would be a good defence.

Second. Against the unbroken current of English authorities there are some cases that have been

United States, v Perez
9 Wheaton 579

cited by the counsel for the Government contained in the reports of Pennsylvania and one in Virginia, but which we respectfully contend either do not apply to this case, or are not authority. In the case in Grattan's Reports, a party was sentenced to a *shorter* term of imprisonment than the shortest term allowed by law. The jailor discovered the error, and under an Act of the Virginia Assembly, brought the prisoner into court and had him resentenced. The cases in Pennsylvania hold, that where on writs of error it appears that sentence has been passed beyond the power of the court to pronounce, the sentence may be vacated and the prisoner remanded to the court below, and there receive the proper sentence; but this proceeding is under a special statute of the State, passed June 16, 1836. It is true that in one case the opinion states that this special statute is declarative of the common law, but it was wholly *obiter* and cannot weigh against the express adjudications of the English courts that no such power exists at common law, and in Daniels *v.* Com., 7 Penn. R. 371, it was held that that statute was against the common law.

In addition to these, Judge Benedict cited the case of Basset *v.* U. S. 9 Wallace 38, in which the following language occurs in the reporter's syllabus, to which Judge Woodruff called attention:

"It is competent for a court, for good cause, to set aside, at the same term at which it was rendered, a judgment of conviction on confes-

sion, though the defendant had entered upon the imprisonment ordered by the sentence."

In this case the prisoner pleaded guilty, was sentenced, and imprisoned. Subsequently he was brought before the court on a writ of *habeas corpus*, the writ was granted, the sentence was vacated, the plea of "*guilty*" was withdrawn a plea of "*not guilty*" permitted, and the accused admitted to bail. He forfeited his recognizance, and the surety set up the fact of the executed sentence as a bar to a recovery on the bond, and the court most wisely and justly held, that it was no defence. Beyond all question a person who pleads guilty, and is sentenced, and afterwards seeks and obtains leave to withdraw that plea and pleads not guilty, has not been within the meaning of the Constitution "for the same offence twice put in jeopardy."

Besides, on the doctrine of estoppel in pais, the accused would have been estopped from setting up the former conviction and sentence, and so would have been all sureties and other privies under him.

This case, if it were adverse (and we have shown that it is not), in view of the fact that it was submitted by the obligors without counsel, and that Mr. Hoar, the Attorney-General, aided by Mr. Field, Assistant Attorney-General, would not have such weight as to invoke the application of the principle of *stare decisis* against us, for the attention of the court was not directed to any decisions in favor of the views herewith submitted. At-

tention is especially called to the fact that the court expressly limited this power of setting aside a judgment to the case of a judgment *rendered on confession.*

In a note to this case two authorities are cited, Cheang-kee *v.* U. S., 3 Wallace 320, and King *v.* Price, 6 East. 323.

The first of these cases was a civil case in which the court had made a finding that plaintiffs were entitled to judgment against defendant for $1,388.10, payable in gold and silver coin, for duties, and ordered judgment to be entered accordingly. Judgment was entered for the recovery in gold coin, and, on application, an amendment was made to insert after gold the words "and silver," which the Supreme Court held was clearly within the power of the court.

The other was a criminal case, where a party was sentenced for perjury. There were two statutes punishing the offence (5 Eliz. c. 9; 2 Geo. II. c. 25), the latter of which was, by a subsequent statute, expressly made cumulative. There was, originally, only one sentence. The court afterwards, in the same term, vacated the first sentence, and resentenced the prisoner under both statutes. It does not appear that the first sentence had been executed, or that any action was taken by the prisoner to have the matter reviewed.

Archbold, after citing this case, states the law as we have before quoted it.

Third. In addition to the authorities cited on the third point which bear upon this proposition, reflection upon the effect of the opposite conclusion will enforce the soundness of this point The criminal term continues about three months from its commencement, by adjournments made from time to time. Suppose a criminal were brought up for trial on the first day of the term, on an indictment for a misdemeanor, the extreme punishment of which was a term of ten days, and on that day were found guilty, and sentenced for ten days imprisonment; that at the end of nine days, under the order of the court, the prisoner were brought into court, the sentence already pronounced vacated, and he resentenced for a term of ten days, and that this course were pursued throughout the entire term of the court, so that the prisoner, for one conviction, were incarcerated for three months and nine days, could that course be approved or justified? Clearly not. Neither could any act by which the imprisonment of any citizen was prolonged one instant beyond the longest term fixed by law. For the cardinal principle, that it is better for ninety-nine guilty to escape, than that one innocent person should be unjustly punished, has an equal application to such a case as this, that it were better that a just punishment should be escaped than an illegal punishment inflicted. And this because, as Hurd on Habeas Corpus eloquently says, "is not because crime has become less odious, but the rights of life and liberty more precious."

Fourth. Again: where is the difference in principle in this case (supposing the term to continue, for the court below deemed *that* the important fact, although in the view of the law herein expressed this makes no difference) between pronouncing a sentence of one year, and after five days imprisonment pronouncing a further sentence of one year, thus making an imprisonment of one year and five days, or sentencing for one year, and at its termination passing a new sentence for five days further. The time of imprisonment would be the same, the only difference being the formula that would mathematically express it, five days plus one year, or one year plus five days. But the ready answer to the latter supposition would be that the addition of five days would be clearly illegal. We reply that the five days in either case is equally illegal, and as there is no power in the court to remit the excess in either case, the second sentence is null and void.

Bishop Crim. Pro., § 1114.
Kroemer *v.* Com., 3 Binn, 577.

Fifth. Or, if the sentence had first been a fine and thereupon the petitioner had paid the amount of the fine in court, could the sentence be vacated and a new sentence of imprisonment be imposed? It may be, that after pronouncing sentence of a fine and before its payment, the court might revoke its sentence and impose imprisonment, as in the case in Allen's Reports, but we deny that even this could be done after the sentence was recorded.

Or, if the law had said that the punishment might be imprisonment for one year *or* two hundred lashes on the bare back, and the sentence had been both, the only difference being lashes instead of dollars, and the jailer had inflicted one hundred and ninety-nine lashes when the court had ascertained its blunder; could the court then have vacated the sentence and have ordered two hundred lashes additional? It makes the blood boil to suppose such monstrous injustice; but if the court had the power to vacate, it must be to vacate all, not part, of the sentence, and so to re-enact any part it chooses.

Sixth. The imprisonment of the defendant has been continuous since the first sentence was pronounced upon him on the third day of November, and the mockery of the amended sentence is this: that whereas by the first sentence he was to be fined $200 and imprisoned a year, by the correction he suffers a fine of $200 and imprisonment for a year and five days.

It has ever been the purpose of the law to make and keep the judiciary pure. One of the means to this end is the removal of temptation from the judges. While judges are human, the prayer "deliver us from temptation," belongs to them in common with the rest of mankind. Consider what temptation there would be to the judges, how powerful the means to corrupt them, if every criminal or his friends could use money or other influences to induce judges to alter the sentence once pronounced!

Illustrations could be multiplied of this almost without end, but two seem so suggestive in view of the mathematical demonstration afforded in New York that filthy lucre has soiled the judicial ermine, that they are here presented. Suppose a corrupt judge should sentence a prisoner to a term of ten years imprisonment, when he had the option to make it from one to ten, and after the man was sent to prison, he was bribed to vacate that sentence and make it one year, could he do it? or the opposite, that when he should make it one year, under the expectation that the prisoner and his friends would reward him, could he vacate that sentence and increase it to ten years if they disappointed him?

As the courts have said in respect to the statute limiting the alienation of property, it is not that the thing will be, but the possibility that the thing may be, that makes it illegal; so here the possibility that in any event such wrongs may be committed in the name of justice, if this power be committed to earthen vessels, makes it incumbent upon the courts to declare the law to have such construction that such things shall be impossible.

The tendency of an irresponsible judiciary is to the exercise of despotic power, but an appellate court, sitting as this court does, as the fountain of justice for the nation, holds the rights of the citizens to be vastly more important than any upholding of the acts of subordinate judges. So this court has in the McArdle case its glorious record that it needed two-thirds of the assembled Congress to prevent

its acting upon a *habeas corpus* record for fear that this court might hold the liberty of the citizen to be higher and more sacred than the maintenance of political opinion of a dominant majority, or the upholding of the adjudication of some subordinate tribunal.

Seventh. The silence of the Judge about the fine, to the payment of which his attention had been called, is a matter to be noticed as bearing upon this question of illegality. He knew that in obedience to his order this money had been paid, that the United States Government had the money, that the petitioner had no intention of *donating* to the Government this money, and yet he made no provision or attempt to restore to him that of which by his own confession he had illegally deprived him.

The only supposable justification that could have presented itself to the mind of the Judge for this silence and neglect—that the petitioner, as the legal fiction required him to know the law, must be held to have known that the sentence was illegal, and therefore paid the fine in his own wrong—would be no justification whatever. Yet, under no other possible supposition could this Honorable Judge have failed to know that he had wronged a man out of so important a sum as two hundred dollars, or would he have failed to have and show some sympathy for one who had, intending promptly to obey the sentence inflicted in this regard, been innocently entrapped into fruitlessly paying away his money.

The language of the Judge that he intended to punish the petitioner for one year, while it cannot weigh against the judgment of the court, for he does not profess that the imposition of a fine was a mere *lapsus linguæ*, yet may throw some light upon the operations of his mind in his subsequent action. Although it is hardly possible to conceive that such was the fact, he might have thought that he would not allow the petitioner to select the punishment to be imposed. The answers to this are so suggestive that they make the supposition frivolous, and we therefore discard all idea that that remark of the judge could have had any such *arriere pensée*. But this thought might be suggested to others, and we therefore answer it. In the first place, the petitioner in fact made no such selection; but was, on the very day and hour that sentence was pronounced, committed to jail in execution of so much of the sentence as demanded imprisonment, while the fine was not paid until the following day; in the second place, the Government and Court have it not in their mouths to say that the sentence was illegally imposed, for they are estopped from so saying after the sentence was put into execution. It is the right of the petitioner only.

In the third place, we say that in law the *payment* of the fine made no difference, and this the English cases above cited all hold. It does not require that the judgment of the court shall be wholly executed, or executed in any complete part to entitle one unjustly

sentenced to bring such illegal sentence before the court for such action thereon in the prisoner's behalf as shall be just; it is enough that the sentence in itself is illegal and that it has proceeded beyond the breast of the court.

It may be urged that the matters in this point are not properly before this Court in a writ of *habeas corpus*. Strictly speaking, this is true, but in connection with this writ the Justices having granted the writ of *certiorari*, it brings before them the equities of the case. *Ex parte* Bollman, 4 Cranch, 75. And this the Court will the more readily enquire into because, by a strange anomaly of the law, while the judgments of the inferior court, in matters of property, are reviewable before the United States Supreme Court, the most august tribunal in the nation, rights of persons cannot be directly brought before that court. We allow the errors committed in trials concerning property to defeat the judgment, but we put the lives and liberties of the citizens absolutely and without appeal into the hands of the courts of original jurisdiction, thus denying to the American citizen that which was one of the proud prerogatives of the Roman citizen, "I appeal to Cæsar," which exists in every other civilized state of the world. In view of this defect, the judges of the Supreme Court and the Court itself have ever been very liberal in enquiring into all matters that pertain to the irregularities complained of by any one suing out a writ of *habeas corpus*, and have hitherto enquired into the matters wherein the record of the inferior court shows that injustice has been done to the citizen.

VI.

The petitioner having shown that the original sentence was illegal, that it had passed beyond the power of the court to correct it, and that the second sentence is a nullity, is entitled to have a writ of *habeas corpus* granted as prayed for, and thereunder to be discharged from his illegal imprisonment.

Edward Lange, having been imprisoned upon a conviction under an Act which permitted the Court to sentence him for a term of however short duration it pleased the Court to impose, not exceeding one year; and having served a term of five days when that sentence was revoked, he had completed a term of imprisonment under the statute, and had expiated the sentence. Were it otherwise, if the second sentence could be viewed as a continuation and part of the first sentence, then the whole was illegal and absolutely void, *ab initio*, because it made a term of imprisonment exceeding the limit of the law.

(See authorities under 2d point.)

The term of imprisonment might have been, in the discretion of the Judge, originally made five days; therefore, after the prisoner had been imprisoned five days, and the Judge vacated that sentence, he made the imprisonment a complete term, and it was not in the power of the Supreme Ruler of events, much less an earthly Judge, to undo the punishment after it had been inflicted. It was irrevocable. So that the prisoner had not only completed his fine, but he had completed a legal term of imprisonment.

It is only just in conclusion to state that this was the first time this statute was ever enforced,

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that the prisoner is a Christian gentleman of position and character, and that the jury acquitted him of all moral guilt, as their affidavits show they found him guilty of a misdemeanor only, made so by a statute passed the previous year. No explanation can be given for the severity of the sentence of the Judge, for he himself would confess, as would also the District Attorney who tried the case, that Edward Lange would never again break the law, if he had been punished by the lightest instead of the heaviest, penalty that the statute imposed.

VII.

The payment of the fine is a complete bar to the infliction of imprisonment under either the first or the second sentence of the Court. If the original sentence had been undisturbed, and Mr. Lange had served his term of imprisonment without paying the fine, no one could claim that then the fine could be collected. So the fine having been paid in full, and accepted by the United States in satisfaction of the sentence as regards the fine, how can the imprisonment be enforced? The principle applies with equal force to the alternative.

> Even if a judge can correct a sentence during the same term and after the prisoner has been given over to the marshal, under ordinary circumstances, he cannot in equity do so where a sentence greater than the statute provides for has been inflicted, and a penalty to the extent of the statute has been executed before correction, because he is unable

to restore the prisoner to his original status; or else if the term lasted so long, and the year had been also served, a new sentence could be imposed, adding another year, making $200 and two years imprisonment. If such a principle was established, an unjust judge could override the law, imposing illegal sentences and after they had been executed in whole or in part, could impose a new one.

VIII.

This case has excited very great interest in the City of New York, and many counsel have from time to time offered valuable suggestions in relation thereto. Among others Charles Tracy, Esq., has kindly volunteered, as an act of friendship, and without fee or reward, to send his views in writing, and we deemed it only just to him to put them before the Court as he presented them to us.

OFFICE OF TRACY, OLMSTEAD & TRACY,
50 Wall street,
New York, Jan. 3, 1874.

CASE OF EDWARD LANGE.

My advice having been asked as to the proceedings for a review in this case, and a copy of the papers on which an argument has been had, including the brief of counsel for Lange having been laid before me, I offer the following as my views.

The review should be had; without repeating what is in the printed brief, the counsel prosecuting the review may fairly claim:

First. The original sentence was not a nullity. It was voidable, not void. Such a sentence stands until judicially vacated, and Lange could not justify breaking of jail or assault of keepers, or sue for false imprisonment, because the court had jurisdiction to sentence him.

Gold *v.* Strode, Carthew, 148.

"If the plaintiff obtain a judgment, and by his own showing have no cause of action, yet because the court had jurisdiction of the cause, this is only an erroneous and not a void judgment. But it is otherwise where the court had no jurisdiction of the cause."

Macnamara on Nullities, 137, S. P.

Second. On the return of the *habeas corpus* the court had no power to change or amend the sentence. Its power in such a case is to declare the sentence valid or invalid, and accordingly to remand or discharge the prisoner. This familiar rule is recognized in the United States statutes.

Act of 1789, 1 U. S. 82, "An inquiry into the cause of commitment."

Act of 1801 (repealed in 1802), 2 U. S. 98 § 30, "To inquire into cause of commitment, and to discharge."

Third. The defendant having suffered punishment in part by paying the fine in full, and serving five days in prison, is not liable to a new sentence for a full term, if for any term whatsoever.

When judgment in a criminal case is reversed for error, the court does not direct a new trial except within certain limits. If the judgment below has been stayed, so that no punishment has been suffered, a new trial is proper, unless the error is in the indictment. But if the sentence has been carried into effect by imprisonment, pillory, whipping, or other bodily suffering, the ordering of a new trial would be a second jeopardy for the same offence.

The question whether the court will regard a partial suffering of the punishment—say ten months of the twelve months imprisonment, or five days of the three hundred and sixty-five—cannot be treated as worthy of consideration. One blow of the whip, or one day of confinement, is punishment inflicted, and the court will never ask how long or how hard was the infliction. The ignominy and disgrace are perfect, and the bodily pain is not to be divided up or thrown into the *minima, de quibus lex non curat.*

Deeming it clear, therefore, that if the sentence of Lange had been reversed on writ of error there would not have been an order for a new trial, I assume it to be still more clear, that when his sentence was avoided by the court on *habeas corpus*, he was entitled to a discharge, *without any increase of punishment, or any punishment at all.*

Fourth. That the sentence was erroneous seems not to be questioned. The verdict was specially given on the lesser offence, and

however general it may stand on the record, still the court interpret a verdict as appliable to the lesser offence. The fine and imprisonment, as imposed, were erroneous, the act of Congress having prescribed fine *or* imprisonment.

CHARLES TRACY.

IX.

The determination of the Circuit Court upon the writ of *habeas corpus* should be reversed, the writ granted, and the accused, upon the return of the Marshal, should be discharged.

ARNOUX, RITCH & WOODFORD,

Attorneys for Petitioner.

WM. HENRY ARNOUX,

Of Counsel.

United States Supreme Court.

IN THE MATTER &c.,

OF

EDWARD LANGE.

Certiorari and Return.

ARNOUX, RITCH & WOODFORD,
Attorneys for Petitioner.

WM. HENRY ARNOUX,
Of Counsel.

NEW YORK:
LANGE, LITTLE & CO., PRINTERS,
108 TO 114 WOOSTER STREET.
1874.

TO THE SUPREME COURT OF THE
UNITED STATES OF AMERICA.

THE petition of Edward Lange, of the city of New York, respectfully shows:

First. That on or about the 7th day of October, 1873, the Grand Jury of the United States of America for the Southern District of New York did indict your petitioner, under an Act of Congress passed on the 8th day of June, 1872, and such proceedings were thereon had that, at a stated term of the Circuit Court of the United States for the Southern District of New York, held in the month of October, 1873, the Hon. Charles L. Benedict, District Judge, presiding, a verdict of guilty was entered in the minutes of the Clerk of this Court.

Second. That thereupon, on the 3d day of November, 1873, at said term of said Court, said Judge sentenced your petitioner to pay a fine of two hundred dollars and to be imprisoned for the term of one year, contrary to the statute in such case made and provided. That on said last-mentioned day your petitioner was, in accordance with said sentence, imprisoned in the Ludlow-street jail, in the city of New York, in discharge of said sentence so far as the imprisonment was concerned, and on the following day your petitioner paid the sum of two hundred dollars to the Clerk of said Court, in full of the above-mentioned fine so imposed by said Judge, and in full satisfaction of said sentence so far as said fine was concerned.

Third. That on the 7th day of November, 1873, a writ of *habeas corpus* was granted, directing the Marshal of the said district to produce your petitioner before the said Circuit Court on the 8th day of November, 1873, in obedience to which writ the said Marshal did produce your petitioner in said Court before said Judge Benedict, and, notwithstanding said Judge acknowledged on that day, in open Court, that said sentence was illegal, the said Judge discharged the writ and remanded your petitioner.

Fourth. That thereupon, regardless of the fact that your petitioner had paid the said fine, had been deprived of his liberty under said sentence, and was in actual custody in pursuance of said conviction and sentence, and the writ of *habeas corpus* had been denied, the said Judge, at said last-mentioned time and place, and holding said Court, without any motion on that behalf made by the District Attorney, and without the assent of your petitioner, the said Judge proceeded to vacate the sentence that had been pronounced by him, and to re-sentence your petitioner for the term of one year from the date of said last-mentioned day, without allowing for imprisonment theretofore suffered, or providing for the return of the fine then paid.

Fifth. That thereafter, on or about the 17th day of December, 1873, your petitioner presented his petition to the Hon. Lewis B. Woodruff, Circuit Judge of the United States in the Second Circuit, praying for a writ of *habeas corpus*, and such proceedings were thereon had that on the 29th day of December, 1873, the said Circuit Court to which said writ was returnable remanded your petitioner and discharged said writ.

And your petitioner now is, and ever since the

said 8th day of November, 1873, has been, a prisoner confined in said jail in the said city of New York in the custody of Oliver Fiske, United States Marshal for the Southern District of New York, under the said illegal sentence pronounced on him on the said 8th day of November, 1873, and is restrained of his liberty in violation of the Constitution of the United States of America and of the law in such case made and provided.

Wherefore your petitioner prays that a writ of *habeas corpus* issue, directed to the said Oliver Fiske, United States Marshal for the Southern District of New York, commanding him to produce your petitioner before this Honorable Court at the City of Washington, at such time as the Court shall direct, and that he then and there show the cause of your petitioner's detention, to the end that your petitioner may be discharged from custody.

And your petitioner also prays that a writ of *certiorari* may issue to Kenneth G. White, Esq., Clerk of the United States Circuit Court for the Southern District New York, commanding him to certify to this Honorable Court the petition of your petitioner, the return thereto, and all the record of said Court respecting the same and the adjudication thereon,

to the end that the errors therein may be corrected by this Honorable Court.

And your petitioner will ever pray, etc.

Dated New York, 31st December, 1873.

EDWARD LANGE.

Southern District of New York, ss. :

Edward Lange, being duly sworn, says that he has read the foregoing petition and that the same is true to his own knowledge, except as to any matters stated or information and belief, and as to those matters he believes it to be true.

EDWARD LANGE.

Sworn before me this 2d of January, 1874.

JAMES CAREY SHEFFIELD,

Notary Public,

New York City.

L. S.

THE UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

SEAL OF THE SUPREME COURT OF THE UNITED STATES.

To the Honorable the Judges of the Circuit Court of the United States for the Southern District of New York.

Greeting:

Whereas lately in the said Circuit Court of the United States for the Southern District of New York a certain Edward Lange filed a petition for a writ of *habeas corpus* which said petition still remains before you the said Judges of the said Circuit Court; and the Supreme Court of the United States being desirous for certain reasons, that the record and proceedings aforesaid should by you be certified to them, you are therefore hereby commanded to send under your seal the record of the proceedings aforesaid with all things touching the same, unto the said Supreme Court of the United States forthwith, plainly and distinctly, in as full and ample manner as it now remains before you, together with this writ, so that the said Supreme Court of the United States may be able thereon to proceed, and do what shall appear to them of right ought to be done.

Witness, the Hon. Nathan Clifford, Senior Associate Justice of the Supreme Court of the United States, this thirteenth day of January, in the year of our Lord, one thousand eight hundred and seventy-four, and of the independence of the United States the ninety-eighth.

D. W. MIDDLETON,
Clerk Supreme Court, U. S.

At a stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Friday, the sixteenth day of January, in the year of our Lord one thousand eight hundred and seventy-four.

Present:

The Honorable CHARLES L. BENEDICT,
District Judge presiding.

In the Matter, &c.,
of
EDWARD LANGE.

On reading the writ of *certiorari* granted herein by the Supreme Court of the United States, on the 13th day of January, 1874, whereby the Judges of the Circuit Court for the Southern District of New York, in the Second Circuit, are commanded to return the proceedings herein, and on hearing Mr. William Henry Arnoux, of Counsel for the petitioner,

It is ordered, that Kenneth G. White, Esq., the Clerk of the Circuit Court for the Southern District of New York, in the Second Circuit, do send, under the seal of the said Court, the record and proceedings aforesaid according to the said writ.

A copy from the Minutes.

KENNETH G. WHITE,
Clerk.

TO THE HONORABLE LEWIS B. WOODRUFF,

CIRCUIT JUDGE OF THE UNITED STATES OF AMERICA FOR THE SECOND CIRCUIT.

The Petition of Edward Lange of the city of New York respectfully shows:

First. That on or about the 7th day of October, 1873, the Grand Jury of the United States of America for the Southern District of New York did indict your petitioner for stealing, embezzling, purloining, and appropriating to his own or other than their proper use certain 2
mail bags belonging to and in use by the Post Office Department of the United States, a copy of which indictment is hereto annexed, marked Exhibit No. 1.

That the Act of Congress under which such indictment was found was passed on the 8th day of June, 1872.

Second. That such proceedings were had on such indictment that at a stated term of the Circuit Court of the United States for the Southern District of New York, held in the month of October, 1873, the Hon. Charles L. Benedict, District Judge, presiding, the ninth count in the 3
indictment was quashed, and the jury duly empaneled to try your petitioner on the remaining counts, to which your petitioner had pleaded not guilty, the names of which jurors appear in Exhibit No. 2, hereto annexed. And the said jury returned and rendered substantially the following verdict against your petitioner: "We find the prisoner guilty of appropriating mail bags to his own use, for convenience and gain"; and they found the value

of the said mail bags to be less than twenty-five dollars, as
4 appears by the affidavits of the said jurors (and others), and their statements hereto annexed, marked Exhibit No. 3, but the clerk of said court entered a verdict of Guilty, as appears by the extract from the minutes, marked Exhibit No. 4.

Third. That thereupon, on the 3d day of November, 1873, at said term of said court, the said judge sentenced your petitioner to pay a fine of two hundred dollars and to be imprisoned for the term of one year, contrary to the statute in such case made and provided, as
5 appears by the clerk's certificate hereto annexed, Exhibit No. 5.

Fourth. That thereupon, on the 4th day of November, 1873, this deponent paid the sum of two hundred dollars in full of the above mentioned fine so imposed by the said judge, and in full satisfaction of the said sentence so far as the fine was concerned, to the clerk of said court, as appears by the receipt hereto annexed, marked Exhibit No. 6, and the said moneys so paid to the clerk were by him duly paid into the Treasury of the United States, as
6 appears by copy receipt, Exhibit No. 7.

Fifth. That on the 5th day of November, 1873, a copy of the sentence was duly delivered to the Marshal of the United States for the Southern District of New York, and this deponent then was or from the time of passing sentence had been confined in the Ludlow street jail in the city of New York, being the proper place of incarceration provided by law in expiation and discharge of said sentence so far as the imprisonment was concerned (*pro tanto*), and deponent caused to be served on said
7 Marshal a copy of the receipt, Exhibit No. 6, showing that the fine was fully paid.

Sixth. That on the 7th day of November, 1873, on

the petition of the Hon. Rufus F. Andrews, one of the counsel of your petitioner, the Hon. Samuel Blatchford, Judge of the United States District Court for the Southern District of New York, granted a writ of *habeas corpus*, directing the said Marshal to produce your petitioner before the said Circuit Court on the 8th day of November, 1873; in obedience to which writ the said Marshal did produce your petitioner in said court before said Judge 8
Benedict, and notwithstanding the said judge acknowledged on that day in open court that said sentence was illegal, as will appear from the perusal of the stenographic notes, Exhibit No. 8, the said judge, on the return of the officer, a copy whereof is hereto annexed, and marked Exhibit No. 9, discharged the said writ.

Seventh. That thereupon, regardless of the fact that your petitioner had paid the said fine and had been deprived of his liberty under the said sentence, and was in actual custody, in pursuance of said conviction and sen- 9
tence, the said judge at said last mentioned time and place, and holding said court, without any motion on that behalf made by the District Attorney, and refusing to permit deponent to be heard by his counsel, who made application then and there in that behalf, the said judge proceeded to vacate the sentence that had been pronounced by him and to resentence your petitioner for the term of one year from the date of said last mentioned day, as appears by the stenographic notes Exhibit No. 8, and the certificate of the clerk of said court, Exhibit No. 10, 10
without allowing for imprisonment then suffered or providing for the return of the fine so paid.

And your petitioner is now and ever since the 8th day of November, 1873, has been a prisoner confined in the Ludlow street jail in said city of New York, in the custody of Oliver Fiske, U. S. Marshal for the Southern District of New York, under the illegal sentence pronounced on the said 8th day of November, 1873, and is restrained of his liberty in violation of the Constitution of the United

11 States of America and of the laws in such case made and provided.

Wherefore your Petitioner prays that a writ of *habeas corpus* issue, directed to the said Oliver Fiske, United States Marshal for the Southern District of New York, commanding him to produce before you your petitioner at such time and place as your Honor shall direct, and that he then and there show to your Honor the original and present
12 cause of your petitioner's detention, together with all papers served upon him in connection with your petitioner, to the end that your petitioner may be discharged from such illegal custody, and your petitioner will ever pray, etc.

Dated New York, 26th day of Nov., 1873.

EDWARD LANGE.

ARNOUX, RITCH & WOODFORD,
Attorneys for Petitioner.

Southern District of New York, ss:

13 Edward Lange, being duly sworn, says that he has read the foregoing petition, and that the same is true to his own knowledge, except as to any matters stated on information and belief, and as to those matters he believes it to be true.

EDWARD LANGE.

Sworn before me this 26th day of Nov., 1873.

L. S.

WM. F. MACRAE,
Notary Public, N. Y. Co.

EXHIBIT NO. 1.

CIRCUIT COURT OF THE UNITED STATES OF AMERICA, FOR THE SOUTHERN DISTRICT OF NEW YORK, IN THE SECOND CIRCUIT.

At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the second circuit aforesaid, on the third Wednesday of June, in the year of our Lord one thousand eight hundred and seventy-three, and continued by ad- 14
journment to and including the seventh day of October, in the year of our Lord one thousand eight hundred and seventy-three:

Southern District of New York, ss:

The jurors of the United States of America, within and for the district and circuit aforesaid, on their oath present, that Edward Lange, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and 15
seventy-two, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully, knowingly, wilfully, and feloniously steal certain mail bags, belonging to the Post Office Department of the said United States, to wit, fifty of said mail bags, each of the value of fifty cents, against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

SECOND COUNT. 16

And the jurors aforesaid, on their oath aforesaid, do further present, that Edward Lange, late of the city and county of New York, in the district and circuit afore-

said, yeoman, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-three, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully, knowingly, wilfully, and feloniously steal certain other mail bags, in use by the Post Office De-
17 partment of the said United States, to wit, fifty of said mail bags, each of the value of fifty cents, against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

THIRD COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Edward Lange, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the first day of De-
18 cember, in the year of our Lord one thousand eight hundred and seventy-two, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully, knowingly, wilfully, and feloniously embezzle certain mail bags belonging to the Post Office Department of the said United States, to wit, fifty of said mail bags, each of the value of fifty cents, against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

19 FOURTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Edward Lange, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-three, at the Southern District of New York, and within the jurisdiction of this court, did

unlawfully, knowingly, wilfully, and feloniously purloin certain other mail bags, belonging to the Post Office Department of the said United States, to wit, fifty of said 20
mail bags, each of the value of fifty cents, against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

FIFTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Edward Lange, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight 21
hundred and seventy-two, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully, knowingly, wilfully, and feloniously steal certain mail bags belonging to, and in use by, the Post Office Department of the said United States, to wit, fifty of said mail bags, each of the value of fifty cents, against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

SIXTH COUNT. 22

And the jurors aforesaid, on their oath aforesaid, do further present, that Edward Lange, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-three, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully, knowingly, wilfully, and feloniously, and to the hindrance of the public service, and for lucre and gain, appropriate to his own use certain other mail bags, 23
belonging to and in use by the Post Office Department

of the said United States, to wit, fifty of said mail bags, each of the value of fifty cents, then and there against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

SEVENTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Edward Lange, late of the city and
24 county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the second day of December, in the year of our Lord one thousand eight hundred and seventy-two, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully, knowingly, wilfully, and feloniously, and to the hindrance of the public service, and for lucre and gain, convey away certain other mail bags belonging to and in use by the Post Office Department of the said United States, to wit, fifty of said mail bags, each of
25 the value of fifty cents, then and there against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

EIGHTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that Edward Lange, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight
26 hundred and seventy-two, at the Southern District of New York, and within the jurisdiction of this court, did knowingly, unlawfully, and for convenience, appropriate to his own use certain mail bags belonging to and in use by the Post Office Department of the said United States, to wit, fifty of said mail bags, each of the value of fifty

cents, then and there against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

NINTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present, that Edward Lange, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the third day of December, in the year of our Lord one thousand eight hundred and seventy-two, at the Southern District of New York, and within the jurisdiction of this court, did knowingly, unlawfully, and for convenience, convey away certain mail bags belonging to and in use by the Post Office Department of the said United States, to wit, fifty of said mail bags, each of the value of fifty cents, then and there against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

TENTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that Edward Lange, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and seventy-two, did knowingly, wilfully, unlawfully, and feloniously, and for lucre, gain, and convenience, and to the hindrance and detriment of the public service, appropriate to his own use, and convey away certain mail bags in use by and belonging to the Post Office Department of the said United States, to wit, fifty of said bags, each of the value of fifty cents, then and there against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

ELEVENTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that Edward Lange, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and seventy-three, at the Southern District of New York, and within the jurisdiction of this court, did unlawfully, knowingly, and feloniously, and for convenience,
31 appropriate to another than its proper use, certain property in use by and belonging to the Post Office Department of the said United States, to wit, fifty mail bags, each of the value of fifty cents, then and there against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

TWELFTH COUNT.

And the jurors aforesaid, on their oath aforesaid, do further present that Edward Lange, late of the city and
32 county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the first day of December, in the year of our Lord one thousand eight hundred and seventy-two, at the Southern District of New York, and within the jurisdiction of this court, he, the said Edward Lange, having then and there the charge and custody of certain property in use by and belonging to the Post Office Department of the said United States, to wit, fifty mail bags, each of the value of fifty cents, then and there did unlawfully, knowingly and wilfully
33 embezzle said property, to wit, said mail bags, then and there against the peace and dignity of the said United States, and against the form of the statute of the said United States, in such case made and provided.

GEORGE BLISS,
U. S. Attorney.

EXHIBIT NO. 2.

UNITED STATES CIRCUIT COURT.

THE UNITED STATES OF AMERICA
agst.
EDWARD LANGE. 34

This is to certify that the following are the names of the Jurors duly impaneled on the 15th day of October, 1873, to try this cause:

Stratford P. Davidson,	Henry Everdell,
William H. Daggett,	Thomas T. Lawrence,
William G. Van der Roest,	William H. Chapman,
George H. Young,	Robert C. Livingston,
John Polhamus,	David S. Dodd,
James A. Oakes,	Daniel L. Hallock.

In witness whereof I have hereunto set my hand and seal 35
this 26th day of November, 1873.

L. S.

KENNETH G. WHITE,
Clerk.

EXHIBIT NO. 3.

UNITED STATES CIRCUIT COURT.

THE UNITED STATES OF AMERICA
agst.
EDWARD LANGE.

Southern District of New York, ss:

36 The undersigned, being duly sworn, do depose, and each for himself deposes and says:

I am one of the jurors impaneled in the above-entitled cause, in the month of October, 1873, to try the said Edward Lange under an indictment found against him for stealing, purloining, embezzling, and appropriating to his own, or other than its proper use, certain mail bags belonging to and in use by the Post Office Department of the United States; that after deliberating upon the evidence we agreed upon a special verdict, which was re-
37 duced to writing, was read by our foreman in court, and delivered to the clerk. The verdict we rendered was substantially as follows:

"Guilty of appropriating to other than their proper use certain mail bags, for his own, convenience and gain;" and we found the value of the property to be less than twenty-five dollars.

That the said special verdict was found upon the one count in the indictment which charged the lowest de-

gree of criminality. And we say, also, that we did not find nor render a general verdict of guilty in this 38
case, nor did we understand the judge to direct the clerk to enter a general verdict of guilty, nor any other than the one found by us, and which is heretofore set forth; nor did we consent to any other verdict than the special verdict as above, being entered or recorded.

WITNESS:

As to Davidson and Oakes:
JOSEPH J. LITTLE.

STRATFORD P. DAVIDSON, Foreman.
WM. H. DAGGETT,
THOMAS T. LAWRENCE, 39

As to Van der Roest and Young:
SAMUEL T. HILLMAN.
SAMUEL T. HILLMAN.
SAMUEL T. HILLMAN.

ROBT. C. LIVINGSTON,
HENRY EVERDELL,
W. G. VAN DER ROEST,
DANIEL L. HALLOCK,
W. H. CHAPMAN,

As to Lawrence:
WM. HENRY ARNOUX.
SAMUEL T. HILLMAN.
JOSEPH J. LITTLE.

GEORGE H. YOUNG,
JAMES A. OAKES. 40

Sworn to before me this 21st day of November, 1873, by the above-named Daggett, Livingston, Everdell, Hallock, and Chapman.

L. S.

RICHARD B. KELLY,
Notary Public, (63) *N. Y. Co.*

City and County of New York, ss:

On the 26th day of November, 1873, before me came Joseph J. Little, one of the subscribing witnesses to the foregoing instrument, who, being by me duly sworn, 41
says that he resides in the City of New York; that he knows Stratford P. Davidson, and James A. Oakes, two of the jurors described in, and who executed the foregoing instrument; that he saw them execute the said in-

strument, and that he thereupon subscribed his name as a witness thereto.

L. S.

WM. F. MACRAE,
Notary Public, N. Y. Co.

City and County of New York, ss:

42 On this 26th day of November, 1873, before me came Samuel T. Hillman, one of the subscribing witnesses to the foregoing instrument, who, being by me duly sworn, says that he knows W. G. Van der Roest, George H. Young, and John Polhamus; three of the jurors described in, and who executed the foregoing instrument; that he saw them execute said instrument, and that he thereupon subscribed his name as a witness thereto.

L. S.

WM. F. MACRAE,
Notary Public, N. Y. Co.

43 *City and County of New York*, ss:

On this 26th day of November, 1873, before me, personally, came Wm. Henry Arnoux, subscribing witness to the foregoing instrument, who, being by me duly sworn, says that he resides in the city of Brooklyn, New York; that he knows Thos. T. Lawrence, one of the jurors described in, and who executed the foregoing instrument; that he saw him execute the same, and that he thereupon subscribed his name as a witness thereto.

L. S.

WM. F. MACRAE,
44 *Notary Public, N. Y. Co.*

UNITED STATES CIRCUIT COURT.

THE UNITED STATES OF AMERICA
agst.
EDWARD LANGE. 45

Southern District of New York, ss:

The undersigned, being duly sworn, says: I am one of the jurors impaneled in the above entitled cause in the month of October, 1873, to try the said Edward Lange, under an indictment found against him for stealing, purloining, embezzling, and appropriating to his own or other than its proper use, certain mail-bags belonging to and in use by the Post Office Department of the United States; that after deliberating upon the evidence we agreed upon a special verdict, which was reduced to writing, was read by our foreman in court, and delivered to the clerk. The verdict we rendered was substantially as follows: 46

"Guilty of appropriating to other than their proper use, certain mail bags, for his own convenience and gain," and we found the value of the property to be less than twenty-five dollars.

JOHN POLHAMUS.

Witness:
SAMUEL T. HILLMAN. 47

City and County of New York, ss:

On the 26th day of November, 1873, before me came Samuel T. Hillman, the subscribing witness to the foregoing instrument, who, being by me duly sworn, says that he resides in the City of New York; that he knows John Polhamus, the person described in, and who executed the foregoing instrument; that he saw him execute the same, and that he thereupon subscribed his name as a witness thereto.

48

L. S.

WM. F. MACRAE,
Notary Public, N. Y. Co.

UNITED STATES CIRCUIT COURT.

THE UNITED STATES OF AMERICA

agst.

EDWARD LANGE.

Southern District of New York, ss:

Joseph J. Little, being duly sworn, says that on the 19th day of November, 1873, David S. Dodd, one of the jurors herein, stated to deponent that he had no objection to sign an affidavit in the following words, to wit:

I am one of the jurors impaneled in the above entitled 49
cause in the month of October, 1873, to try the said Edward Lange, under an indictment found against him for stealing, purloining, embezzling, and appropriating to his own or other than its proper use, certain mail bags belonging to and in use by the Post Office Department of the United States; that, after deliberating upon the evidence, we agreed upon a special verdict, which was reduced to writing, was read by our foreman in court, and delivered to the clerk. The verdict we rendered was substantially, to the best of my recollection, as follows: 50
"Guilty of appropriating to other than their proper use certain mail bags, for his own convenience and gain;" and we found the value of the property to be less than twenty-five dollars. And deponent says further that we did not find nor render a *general verdict of guilty* in this case, nor did we understand the judge to direct the clerk

to enter a general verdict of guilty, nor any other than the one found by us, and which is hereinbefore set forth; nor did we consent to any other verdict than the special
51 verdict, as above, being ordered or recorded.

That such affidavit was drawn and presented to him on the following day, when said Dodd declared that the statement was correct, but that he declined to sign it under the advice of his counsel.

JOSEPH J. LITTLE.

Subscribed and sworn to before me,
this 26th day of November, 1873.

WM. F. MACRAE,
Notary Public, New York County.

L. S.

UNITED STATES CIRCUIT COURT. 52

THE UNITED STATES OF AMERICA

vs.

EDWARD LANGE.

Southern District of New York, ss:

The undersigned, being duly sworn, each for himself, says: I was present at the time the jury brought in their verdict in the United States Circuit Court for the Southern District of New York in the above trial; that the foreman of the jury had at the time in his hand a paper from which he read the verdict of the jury, in substance 53 as follows:

"We find the accused guilty of appropriating mail bags to his own use for convenience and gain, and we find the value of the property to be less than twenty-five dollars."

That thereupon the said paper was handed up to the judge; that the judge asked the jury if they found the prisoner guilty, and the counsel for the prisoner said: "No; they render a special verdict." And the judge thereupon said to Mr. Andrews, of counsel for the pris- 54 oner, handing to him the said slip of paper handed to him by the foreman, and in the presence of the District Attorney and the Assistant District Attorney, Mr. Purdy, "There is the verdict of the jury; you can put it under any count you please." Mr. Andrews then asked: "Will it make any difference in the punishment?" and the judge said "No." And Mr. Andrews then said: "I do not see why it is necessary for me to bother about it."

And each deponent further says: I did not know or
55 understand that a general verdict of guilty was entered by the clerk, or directed by the court in this case.

RUFUS F. ANDREWS,
WM. HENRY ARNOUX,
WM. F. MACRAE,
W. JENNINGS DEMOREST.

Sworn to this 24th day of November, 1873.

DAVID THORNTON,
Notary Public, New York County.

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56 UNITED STATES CIRCUIT COURT.

THE UNITED STATES OF AMERICA
vs.
EDWARD LANGE.

Southern District of New York, ss:

The undersigned being duly sworn says: I was present at the time the jury brought in their verdict in the United States Circuit Court for the Southern District of New York, in the above trial; that the foreman of the jury had at the time in his hand a paper from which
57 he read the verdict of the jury, in substance as follows: "We find the accused guilty of appropriating mail bags to his own use for convenience and gain, and we find the value of the property to be less than twenty-five dollars;" that thereupon the said paper was handed up to the judge; that the judge asked the jury if they found the prisoner guilty, and the counsel for the prisoner said:

"No; they render a special verdict," and I further say that I did not know or understand that a general verdict of guilty was entered by the clerk or directed by the court in this case. 58

JOSEPH J. LITTLE.

Sworn and subscribed before me this 26th day of November, 1873, by Joseph J. Little.

JAMES CAREY SHEFFIELD,
Notary Public, N. Y. Co.

L. S.

UNITED STATES CIRCUIT COURT.

THE UNITED STATES OF AMERICA
vs.
EDWARD LANGE. 59

Southern District of New York, ss:

The undersigned being duly sworn says, I was present at the time the jury brought in their verdict in the United States Circuit Court for the Southern District of New York, in the above trial: that the foreman of the jury had at the time in his hand a paper from which he read the verdict of the jury, in substance as follows: "We find the accused guilty of appropriating mail bags to his 60 own use for convenience and gain, and we find the value of the property to be less than twenty-five dollars," that thereupon the said paper was handed up to the judge; that the judge asked the jury if they found the

prisoner guilty, and the counsel for the prisoner said something which I did not understand, and thereupon the judge said to Mr. Andrews, of counsel for the prisoner, handing to him the slip of paper handed to the judge by the foreman, and in the presence of the District-
61 Attorney and the Assistant District-Attorney, Mr. Purdy, "There is the verdict of the jury, you can put it under any count you please." And the deponent further says, I did not know or understand that a general verdict of guilty was entered by the clerk or directed by the court in this case.

HALSEY MOORE,
WILLIAM H. CHARLOCK

Sworn and subscribed to before me this 25th day of No-
62 vember, 1873, by Halsey Moore and W. H. Charlock.

JAMES C. SHEFFIELD,
Notary Public, N. Y. Co.

L. S.

EXHIBIT NO. 4.

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the second circuit, held at the United States Court Rooms in the City of New York, on Thursday, the twenty-second day 63
of October, in the year of our Lord one thousand eight hundred and seventy-three.

Present:

The Hon. CHARLES L. BENEDICT,
District Judge, Presiding.

THE UNITED STATES
agst.
EDWARD LANGE.

This cause being still on trial the jurors are called and severally answer to their names. 64

Mr. A. H. Purdy concludes his summing up on part of prosecution.

Charge is thereupon given by the court to the jury, who retire under charge of an officer duly qualified to attend them, and on their return say that they find the prisoner guilty, and the value of the bags to be less than twenty-five dollars, and so they say all.

A copy.

KENNETH G. WHITE,
Clerk.

65 # EXHIBIT NO. 5.

At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the second circuit, held at the United States Court Rooms, in the City of New York, on Monday, the third day of November, in the year of our Lord one thousand eight hundred and seventy-three.

Present:

The Hon. CHARLES L. BENEDICT,

66 *District Judge, presiding.*

THE UNITED STATES OF AMERICA

agst.

EDWARD LANGE.

On motion of the United States District-Attorney, ordered sentence.

The court thereupon proceeds to pass judgment, and sentence the prisoner, Edward Lange, to be imprisoned for the term of one year, and to pay a fine of $200.

(A copy) KENNETH G. WHITE,

67 *Clerk.*

EXHIBIT NO. 6.

UNITED STATES CIRCUIT COURT.

THE UNITED STATES OF AMERICA
agst.
EDWARD LANGE.

NEW YORK, 4th November, 1873.

Whereas, at a stated term of the court for the Southern District of New York, held on the third day of November, 1873, Hon. Charles L. Benedict, District Judge, presiding, the above-named Edward Lange was sentenced 68
to be imprisoned for the term of one year, and to pay a fine of two hundred dollars.

This is to certify that I have this day received the sum of two hundred dollars in full, of the above-mentioned fine so imposed by the said judge, and in full satisfaction of the said sentence, so far as the said fine is concerned, and which said sum is now on deposit in the registry of this court.

In witness whereof I have hereunto subscribed my name, and affixed my seal of office, the day and 69
year first above written.

L. S.

KENNETH G. WHITE,
Clerk.

EXHIBIT NO. 7.

No. 1270.

Office of the U. S. Assistant Treasurer,

NEW YORK, Nov. 7, 1873.

I certify that Kenneth G. White, Clerk of the United States Circuit Court, Southern District, New York, this
70 day deposited to the credit of the Treasurer of the United States two hundred dollars, being a fine imposed by said court in a criminal case of United States *vs.* Edward Lange, for which I have signed triplicate receipts.

[$200.]

THOS. HILLHOUSE.
Assistant Treasurer United States.

EXHIBIT NO. 8.

In the matter
of
EDWARD LANGE. 71

Southern District of New York, ss:

William C. Peckham, being duly sworn, says: I am a stenographic reporter. I attended in the United States Circuit Court on the 8th day of November, 1873, the Hon. C. L. Benedict, District Judge, presiding, and I took full stenographic notes of the proceedings that morning. The annexed statement is a full and complete report of all that took place in reference to the Lange 72 matter after the opening speech of the Hon. R. F. Andrews in the habeas corpus matter.

WM. C. PECKHAM.

Sworn before me this 26th day of November, 1873.

L. S.

WM. F. MACRAE,
Notary Public, New York County.

UNITED STATES CIRCUIT COURT,
Southern District of New York.

73 *In the matter of*
EDWARD LANGE, ETC.,
on
HABEAS CORPUS.
Before
HON. C. L. BENEDICT.

NEW YORK, November 8th, 1873.

At the conclusion of the remarks of R. F. Andrews, Esq., of counsel for Lange, Mr. Purdy, Assistant United States District Attorney, rose to reply, but was interrupted by the Court.

The Court.—I do not care to hear any more extended
74 remarks, because my attention has been called to the matter, and I understand it fully.

Mr. Purdy.—If your Honor will allow me one word, I submit that this is a question under a writ of *habeas corpus*, and I make a return to this *habeas corpus* of a certified copy of this sentence. The verdict was Guilty, and the court proceeded to pass sentence, and sentenced the prisoner, Edward Lange, to imprisonment for one year, and to pay a fine of two hundred dollars. The indictment was upon eleven counts, and he was found guilty
75 upon that indictment. The court cannot go back of the record. The record is there, and the fact that the jury made statements before the court took their verdict makes no difference, or if they all changed their minds, but it stands on the record they found a verdict on full counts.

The Court.—I have no doubt upon the facts disclosed in this case, if the jury had been charged to find a differ-

ent verdict, or to find a verdict on different counts, the jury would have found the prisoner guilty on several counts specifically, because the proof on different acts seems 76
equally satisfactory to the mind. I have no doubt if the jury had found him guilty on different counts, he could have been sentenced on one to several years' imprisonment, and on another to the fine of two hundred dollars; and I will not say, but perhaps it is true, that on a general verdict he is guilty on every count, and the record does not disclose any error which could have been interfered with on a writ of *habeas corpus*. Still I know very well that the jury was not requested to find a verdict on different counts. I know very well what I stated to the 77
jury was, they should find a verdict on one transaction, and that verdict I understood, and I intended to pass sentence on only one transaction, because the jury had not been requested to find a verdict on more than one transaction, but because the jury did not find the value of the property to be more than twenty-five dollars, when perhaps the evidence would justify for a larger amount. Therefore, when I sentenced him, I intended to place the highest sentence on one offense, and as that cannot include both imprisonment and fine, I got the reading wrong, or of course I should not 78
have directed the sentence entered. I saw it directly my attention was called to it by counsel, or it was called to it by the District Attorney. Therefore I do not think the writ can be maintained to modify the sentence. The order of the Court is that the sentence be vacated, and the prisoner be sentenced to imprisonment for one year.

Mr. Arnoux.—With respect to that before your Honor passes sentence——

The Court.—I pass sentence and if that is not right you can bring it up hereafter—perhaps on some other 79
motion; but the record will now be that he is sentenced to one year's imprisonment.

Mr. Arnoux.—I wanted to show that it is not in your Honor's power to make that sentence. I will make my remarks as brief as possible.

The Court.—I do not hesitate at all. I have examined the question and I do not hesitate to inflict that sentence, and that is the sentence of the Court. If there is any way in which that can be shown to be erroneous I
80 will hear the argument on some other motion.

Mr. Arnoux.—I move that the record of the original conviction be so amended as to read that—I mean the determination of the jury—may be presented on the face, so if we bring it upon *certiorari* this will show the finding of the jury. I ask your honor to direct the clerk to amend the record of the Court to read in accordance with what the District Attorney and myself agree was the finding of the jury. "We find the prisoner guilty of appropriating to his own use certain mail bags for his
81 own convenience and gain, and we find the value of the mail bags to be less than $25." The District Attorney agrees with me on the verdict.

The Court.—No, I shall direct the verdict guilty of stealing mail bags of the value of $25.

Mr. Arnoux.—In passing the sentence originally that your Honor intended to pass sentence for one transaction.

The Court.—No.

Mr. Arnoux.—If we are bound by the record the Court may say your Honor intended to pass sentence
82 under different counts of the indictment. Your Honor admits that was not the intent, and your Honor understood the finding was in respect to only one count of the indictment. Your Honor can tell by examining the different counts of the indictment there was but one count under which that verdict that the jury rendered could be entered, and your Honor said at that time that the counsel for the prisoner and the District Attorney would agree together as to under which count of the indictment the verdict should be entered, and that matter
83 was left with my distinguished associate Mr. Andrews; he not understanding that there might be a conviction under different counts, and satisfied with the finding that

the property was less than $25, concluded to take the instruction of your Honor and put it into effect.

The Court.—The verdict of guilty and the one year's imprisonment is the sentence I intended to pronounce.

Mr. Arnoux.—The only reason I ask this is, if we *certiorari* these proceedings that then what has been done, may appear regularly on the record according to the intent of the jury, according to their own finding, and ac- 84
cording to the instruction your Honor gave at the time.

The Court.—No; the only finding was guilty. That is the only verdict I can say—

Mr. Andrews.—May I beg your Honor's pardon, a paper was handed to your Honor and it was handed by you to me, and you said, "Mr. Andrews, I will put this under any count you please," and I said to your Honor, "will it make any difference about the punishment?" and you said "No."

The Court.—I recollect it exactly as the counsel says; 85
I do not care to listen any further. The verdict is Guilty, and the sentence of the court is that he be imprisoned for one year.

The court then immediately called up other business.

EXHIBIT NO. 9.

United States Marshal's Office.
Southern District of New York,
41 Chambers Street.

NEW YORK, 187

86 IN obedience to the within writ, I do herewith produce the within named Edward Lange, and a certified copy of the sentence of this court, which said sentence is the cause of the imprisonment and detention of the said Lange.

OLIVER FISKE,
U. S. Marshal.

EXHIBIT NO. 10.

At a stated Term of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, held at the United States Court Rooms, in the City of New York, on Saturday, the eighth day of November, 87
in the year of our Lord one thousand eight hundred and seventy-three.

Present:

The Hon. CHARLES L. BENEDICT,
District Judge Presiding.

THE UNITED STATES
agst.
EDWARD LANGE.

Ordered, that the sentence pronounced in the above 88
entitled cause on the 3d day of November, 1873, be and the same is hereby vacated and set aside.

The Court thereupon proceeds to pass judgment anew, and re-sentence the prisoner, Edward Lange, to be imprisoned for the term of one year.

A copy,

KENNETH G. WHITE,
Clerk.

UNITED STATES CIRCUIT COURT.

89 SECOND CIRCUIT.

In the matter
of
EDWARD LANGE.

On the annexed petition, and on motion of Arnoux, Ritch and Woodford, Attorneys for Petitioner,

It is ordered, that the United States District Attorney for the Southern District of New York, and the United States Marshal of said district, show cause before the Circuit Court of the United States, for the Southern District of New York, at the United States Court-room,
90 in the City of New York, on Wednesday, the 24th day of December, 1873, at 11 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why a writ of *habeas corpus* and a writ of *certiorari* should not issue herein, to the end that the petitioner may be discharged from custody, or that he may have such other or further relief as to me shall seem just.

L. B. WOODRUFF,
Circuit Judge.

UNITED STATES CIRCUIT COURT. 91

SECOND CIRCUIT.

In the mattter
of
EDWARD LANGE.

New York, December 20, 1873.

Due service of a copy of the within petition and order is hereby admitted.

GEORGE BLISS,
U. S. Atty.

Southern District of New York: ss. 92

Haley Fisk, Jr., being duly sworn, deposes and says that he served a copy of the within order and petition on Oliver Fiske, United States Marshal for the Southern District of New York, on Saturday, December 20th, 1873, by delivering to Mr. John E. Kennedy, at that time in charge of the said marshal's office, and leaving with him the said copy, the said Oliver Fiske being absent at that time.

HALEY FISK, JR.

Sworn to before me this 20th day of December, 1873.

L. S. 93

RICHARD B. KELLY,
Notary Public,
N. Y. Co.

[Extract from the Minutes.]

Wednesday, December 24, 1873.

The court meets pursuant to adjournment, and is opened by proclamation.

Present:

JUDGES WOODRUFF, BLATCHFORD AND BENEDICT.

THE UNITED STATES

vs.

94 EDWARD LANGE.

The motion for a writ of *habeas corpus* in the above entitled cause coming on to be heard.

Mr. Wm. Henry Arnoux is heard in favor of motion.

Mr. A. H. Purdy is heard in opposition.

Mr. Wm. Henry Arnoux is heard in reply.

The Court after taking a recess for two hours, denies the motion.

THE PRESIDENT OF THE UNITED STATES OF AMERICA:

TO THE MARSHAL OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

95 *Greeting:*

We command you that you have the body of Edward Lange, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said Edward Lange shall be called or charged, before the Circuit Court of the United States, for the Southern District of New York, on Monday, the 29th day of December,

1873, at 11 o'clock A. M., at the United States Court Rooms in the city of New York, to do and to receive what shall then and there be considered, concerning the 96
said Edward Lange. And have you then and there this writ.

Witness, Hon. Nathan Clifford, Associate Justice of the Supreme Court of the United States, the 24th day of December, one thousand eight hundred and seventy-three.

KENNETH G. WHITE,
Clerk.

ARNOUX, RITCH & WOODFORD,
Att'ys for Petitioner.

The foregoing writ is allowed, December 24th, 1873. 97

SAMUEL BLATCHFORD,
District Judge.

(Endorsed)—Served United States Marshal's office, December 29, 1873. *Filed December* 29, 1873.

In obedience to the within writ I do herewith produce the body of the within named Edward Lange, together with a copy of the sentence and judgment of this Court, which said sentence and judgment is the cause of his imprisonment and detention.

OLIVER FISKE, 98
U. S. Marshal.

December 29, 1873.

99 At a stated term of the Circuit Court of the United States of America, for the Southern District of New York, in the second circuit, held at the United States Court Rooms, in the City of New York, on Monday, the 29th day of December, in the year of our Lord one thousand eight hundred and seventy-three.

Present:

The Hon. CHARLES L. BENEDICT,

District Judge, presiding.

100 *In the matter, etc.,*

of

EDWARD LANGE.

An application having been made by the above-named Edward Lange for the issuing of a writ of *habeas corpus*, which application has been heretofore, to wit, on the 24th day of December, 1873, heard and denied; but for the purpose of preserving the rights of the said Edward Lange, leave was then granted for the issuing of said writ, which writ, in accordance with such
101 leave, has been issued and returned this day:

Now, on reading the return of the United States Marshal to said writ, and on hearing Mr. Arnoux in behalf of the petitioner, and Mr. Purdy, Assistant United States District Attorney, in opposition thereto, and it being conceded that the second sentence was pronounced in the same term of the said court in which the first sentence was pronounced,

It is ordered, That the prisoner be remanded, and

the writ be dismissed, pursuant to the opinion of the 102
court delivered on said 24th day of December, 1873.

CHARLES L. BENEDICT.

A true copy.

KENNETH G. WHITE, *Clerk.*

UNITED STATES CIRCUIT COURT.

THE UNITED STATES
vs.
EDWARD LANGE.
} Dec. 24, 1873.

103

Per Curiam.

We are of opinion that the judgment rendered in this case, it being for a punishment expressly authorized by statute, cannot be impeached under the proceedings by *habeas corpus*, if the court had jurisdiction to pronounce that judgment.

The only ground upon which that jurisdiction is questioned is that the court had, on a previous day in the same term, pronounced judgment imposing a different 104
punishment.

That former judgment had been vacated by order of the court.

If the court had power to vacate that judgment, it became of no effect, and it was the duty of the court to proceed to deal with the prisoner upon his conviction of the offence charged in the indictment.

That the court had such power is, we think, established by the authorities which were referred to on the argument. 105

The court having such power, during the same term, the former judgment is to be regarded as being subject

to the exercise of such power by the court, if required by the ends of justice. Any inconvenience to the prisoner wrought thereby is to be regarded as one of the incidents to the administration of justice, arising from the temporary occurrence of error or irregularity; and
106 such former judgment being confessedly wholly illegal, what was done under it can have no effect to take away the jurisdiction of the court to proceed, at the same term, to a legal sentence.

We are, therefore, of opinion that the prisoner is not deprived of his liberty in contravention of the Constitution or laws of the United States, and that if he were before us on the writ prayed for, we should be compelled to remand him to the custody in which he now is. The application is, therefore, refused.

107 A copy,

KENNETH G. WHITE,
Clerk.

UNITED STATES OF AMERICA,
Southern District of New York, } ss.:

I, Kenneth G. White, Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, do hereby certify that the foregoing pages, numbered from 5 to 46 inclusive, contain a true and complete transcript of the record and proceedings had in said Court, with all things touching the same in the matter, etc., of Edward Lange, 108
in as full and ample manner as the same now remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this seventeenth day of January, in the year of our Lord, one thousand eight hundred and seventy-four, and of the independence of the said United States, the ninety-eighth.

KENNETH G. WHITE, 109
Clerk.

SEAL.

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15th Edition

157

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

Ex parte EDWARD LANGE—No. 9, O. D.

On Certiorari and Habeas Corpus to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1873.

Ex parte EDWARD LANGE—No. 9, O. D.

On Certiorari and Habeas Corpus to the Circuit Court of the United States for the Southern District of New York.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The relator was convicted at last June term of the circuit court for the southern district of New York of stealing certain mail-bags belonging to the post office, and a sentence passed upon him that he be imprisoned one year and pay a fine of $200. He was on the same day committed to jail in execution of the sentence, and on the following day he paid the fine to the clerk of the court.

On the 5th of November, during the same term of the court, the prisoner was brought up on *habeas corpus*, and the judge who sentenced him vacated the sentence pronounced, and resentenced him to one year's imprisonment from the 8th of November. Upon *habeas corpus*, the legality of the new sentence was affirmed, and the relator brings his case here.

ARGUMENT.

The conviction, the first sentence, the first writ of *habeas corpus*, the vacating of the sentence, and the resentencing of the prisoner, all took place during the same term of court, and the second sentence was imposed by the same judge who had tried the relator and imposed the first sentence upon him.

It is well established as the law of this court, and the general rule of the criminal law, that a sentence passed upon a person, if erroneous, may be vacated like any other judgment during the term in which it was pronounced, by the court which awarded it, and the prisoner resentenced according to law.

Bassett *vs.* United States, 9 Wall., 38.
The King *vs.* Price, 6 East, 323.
The King *vs.* The Justices of Leicestershire, 1 M. & S., 442.
Beale *vs.* The Commonwealth, 24 Penn. St., 11, and cases cited.
The State *vs.* Harrison, 10 Yerger, 542.
Logan's case, 5 Grat., 692.
Miller *vs.* Finkle, 1 Parker, C. C., 374.
Com. Dig., Indictment, N.
2 Hawk., ch. 48, § 20.
2 Gabbett's Crim. Law, 564, 565.

The first sentence, being thus vacated by the judge who awarded it, became void and of no effect, and the case stood as though no sentence had been imposed; and the second sentence, being conformable to law, is binding. As the power of the court to resentence a

Gabbs criminal Law
p 202

prisoner is not affected by the fact that he had entered upon the imprisonment ordered by the court under the first sentence, so it cannot be affected by the fact that he had paid into court the fine imposed upon him. Whether the fine thus imposed may be remitted by the court or by any judicial authority, is not a question that can be raised in this proceeding. It is sufficient that the fact of its payment does not invalidate the second sentence; and the relator must apply elsewhere to have it refunded.

See also The King *vs.* Loveden, 8 T. R., 615, 618.

This case is wholly distinguishable in principle from those cases which relate to the power of a court to resentence a prisoner where the judgment has been reversed upon writ of error.

GEO. H. WILLIAMS,
Attorney General.

C. H. HILL,
Assistant Attorney General.

2 Allen 144